Supreme Court, U.S.
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No. 04-718

In the
Supreme Court of the United States

GEORGE A. WILLIAMS,
MICHAEL A. PERRYMAN, et al.,
Petitioners,

v.

CONSOLIDATED CITY OF JACKSONVILLE,
RAYFIELD ALFRED, Fire Chief, in
his individual and official capacities,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Eleventh Circuit's standard for determining whether a constitutional right is "clearly established," in the context of qualified immunity, conflict with this Court's decision in *Hope v. Pelzer* ?

2. Whether the state of the law on racial discrimination in public employment in 1999 was "clearly established," giving Respondent, Fire Chief/department head Rayfield Alfred fair warning that it was unconstitutional, in the absence of an affirmative action plan, to base promotional decisions on the race or gender of the next eligible candidates, in a deliberate attempt to maintain racial balance according to Respondent's personal wishes.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The Petitioners are George A. Williams, Michael A. Perryman, Michael B. Price, and Judy C. Sauls, as Personal Representative for the Estate of Nolen A. Sauls. Petitioners are all individual persons.

Respondent Rayfield Alfred is also an individual. The Consolidated City of Jacksonville will not be affected by the Court's decision. There is no publicly traded stock involved in this case.

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The official and unofficial reports of the opinions and orders entered in this case are: *Williams v. Consolidated City of Jacksonville*, 268 F.3d 1057 (11th Cir. 2001); *Williams v. Consolidated City of Jacksonville*, 2002 U.S. Dist. LEXIS 27066 (M.D. Fla. July 3, 2002); *Williams v. Consolidated City of Jacksonville*, 341 F.3d 1261 (11th Cir. 2003); and *Williams v. Consolidated City of Jacksonville*, 381 F.3d 1298 (11th Cir. 2004) (rehearing *en banc* denied, with opinions).

STATEMENT OF JURISDICTION

The opinion sought to be reviewed was entered on August 14, 2003. Rehearing *en banc* was denied by the Eleventh Circuit by opinion entered August 27, 2004. This petition for certiorari is timely in that Petitioner has filed it within 90 days of August 27, 2004. The Court has jurisdiction pursuant to 28 U.S.C § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981:

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000e-2 (Title VII) provides, in pertinent part:

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Fla. Stat. §§ 760.10 (Florida Civil Rights Act):

§ 760.10. Unlawful employment practices

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would

deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

STATEMENT OF THE CASE

This petition involves the issue of qualified immunity and whether the standard used by the Eleventh Circuit to determine if a constitutional violation is a matter of "clearly established" law is in conflict with the decisions of this Court. Petitioners are Rescue Lieutenants with the City of Jacksonville, Florida Fire Department. Respondent was the Fire Chief/Department Head, at all times material.[1] Petitioners' Complaint in the District Court asserts four counts of racial and gender discrimination in employment. Count I seeks relief from the Consolidated City of Jacksonville (the City) and Fire Chief Rayfield Alfred (Chief Alfred), in his official and individual capacities, under 42 U.S.C. §1983 (violation of Equal Protection Clause). Count II seeks relief against Chief Alfred, in his official and individual capacities, under 42 U.S.C. §1981. Counts III and IV seek relief from the City and Chief Alfred in his official capacity only, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq., as amended, and the Florida Civil Rights Act (FCRA). The District Court had jurisdiction pursuant to 28 U.S.C. §§1331 and 1343.

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[1] Respondent was appointed by then Mayor John Delaney. Respondent was terminated when Mayor Delaney was replaced by Mayor John Peyton, following a general election.

Respondent's Deliberate Attempt to Maintain Racial and Gender Balance

Chief Alfred decided in October 1999 that he would not create four new Rescue Captain positions within the City of Jacksonville's Fire and Rescue Department. The positions had been requested by the Chief of the Rescue Division. Alfred agreed with the concept and the desirability of the positions. Had Alfred approved the positions, the Petitioners would have been promoted into them.[2] Chief Alfred decided to not create the positions, however, specifically because the Petitioners are white males. His motivation was twofold: (1) Respondent had a desire to prevent the Petitioners from being promoted, because of their race and gender, and (2) Respondent desired to maintain an *unfilled* need for the positions until minority candidates could be chosen. Chief Alfred deliberately attempted to maintain his idea of an appropriate racial balance within all ranks of the Fire Department. By delaying creation of the positions, the Petitioners were no longer the next in line for promotion, because the promotion list they were on "died" before Chief Alfred created the new positions. This was Chief Alfred's intention. Chief Alfred is African American. There is no affirmative action plan involved.

Respondent Violated "Clearly Established Law"

Petitioners sued Chief Alfred in his individual capacity, arguing that he was not entitled to qualified immunity. Petitioners alleged that Chief Alfred's gender and racial discrimination in 1999 was in violation of the Equal

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[2] Petitioners do not maintain that Chief Alfred had an obligation to create the positions. The issue is whether his decision to postpone their creation was based on race or gender.

Protection Clause of the Constitution, and that it was in violation of clearly established law prohibiting such conduct in public employment.

Motion to Dismiss/Qualified Immunity/*Williams I*

The Respondents moved to dismiss Petitioners' Complaint arguing, among other things, that it did not state sufficient facts to overcome the qualified immunity sought by Chief Alfred. The District Court denied Respondents' Motion to Dismiss. The Eleventh Circuit affirmed in *Williams I*, 268 F.3d 1057 (11th Cir. 2001).

Motion for Summary Judgment/Qualified Immunity/*Williams II*

After discovery was concluded, Respondents moved for summary judgment arguing, among other things, that Petitioners had adduced no evidence to justify depriving Chief Alfred of qualified immunity . Respondents also argued that Petitioners had not adduced sufficient evidence to support the claim of a constitutional violation. The District Court denied Respondents' Motion in its entirety. *Williams v. Consolidated City of Jacksonville*, 2002 U.S. Dist. LEXIS 27066 (M.D. Fla. July 5, 2002). It also granted Petitioners' Motion for Summary Judgment, finding that the Respondents had adduced no evidence of any affirmative action plan, contrary to the City of Jacksonville's affirmative defense.

In its second opinion in this case, the Eleventh Circuit affirmed the finding of a constitutional violation, but reversed on the issue of qualified immunity, finding that there was insufficient notice to Chief Alfred in 1999 that his conduct was illegal. Judge Tjoflat, dissenting in the Court's subsequent denial of rehearing *en banc*, disagreed, stating:

> The law of this circuit – indeed, the law of this nation – is (and was in 1999) that, outside of certain narrow circumstances totally inapplicable to this case, *a government official may not base decisions, particularly employment decisions, on racial grounds at all*. This fact would have been readily apparent to a reasonable government actor considering the above-cited litany of cases and the statements of general principle they articulate.

Id. 381 F.3d at 1305 (italics added)

The Court in *Williams II*, however, rejected the notion that cases generally prohibiting racial discrimination in public employment were sufficient notice. The Court distinguished decisions which had held that it was impermissible to make race-based decisions regarding "...hiring, termination, promotion, or transfer to or from an *existing* position...," and a decision "...to refuse to fill an *existing* position because of the race of an applicant...," "...or to reorganize *existing* positions to avoid promoting an employee because of her gender," finding "...the employment action at issue in this case is distinctly different than those employment actions." *Williams II*, 341 F.3d at 1272-73 (11th Cir. 2003).

The *Williams II* Court based its decision on a finding that there was no case which had addressed the precise issue of whether a government actor could permissibly decide to not create positions, in order to deny them to persons of a certain race or gender, and in order to save them for persons of a different race and gender. Petitioners moved for rehearing arguing, among other things, that the Court had overlooked its own earlier decision in *Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056 (11th Cir. 1992), involving materially similar facts. While Plaintiff's petition for rehearing was

pending, the Eleventh Circuit was accepting briefs on another case involving this same issue, namely, whether "clearly established" law requires an earlier case involving essentially identical facts. See *Evans v. City of Zebulon*, 351 F.3d 485 (11th Cir. 2003), *vacated by, reh., en banc, granted by Evans v. City of Zebulon*, 364 F.3d 1298 (11th Cir. Oct. 14, 2004). The *Zebulon* case was pending before the Eleventh Circuit as this petition was being printed.

Denial of Rehearing *En Banc* (with dissenting opinions)/*Williams III*

The Eleventh Circuit denied Petitioners' petition for rehearing *en banc* in *Williams* III, 381 F.3d 1298 (11th Cir. 2004). In two dissenting opinions, however, Judges of that Court stated that the majority decision denying rehearing *en banc* was in conflict with this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002). Judges Tjoflat and Barkett of the Eleventh Circuit stated that Chief Alfred had violated clearly established law when he decided, in 1999, to not create the four new positions, based solely on the race and gender of the next eligible candidates. *Williams III*, 381 F.3d at1303-05 (Tjoflat, J.); and 1308 (Barkett, J.). Judges Tjoflat and Barkett also expressly found that Chief Alfred was on notice that his conduct was illegal, by virtue of a materially indistinguishable, earlier decision by the Eleventh Circuit. The majority disagreed, on the basis that the earlier decision, *Yeldell v. Cooper Green Hospital, Inc.*, 956 F. 2d 1056 (11th Cir.1992) did not involve sufficiently similar facts. Judge Tjoflat wrote that the immediate case, if reheard *en banc*, "... would have had enormous precedential value and could dramatically clarify the law to the benefit of future parties and panels." 381 F.3d. at 1307.

The Eleventh Circuit's rigid basis for determining that the law violated by Chief Alfred was not "clearly established" conflicts with this Court's holding in *Hope v. Pelzer*.

REASON FOR GRANTING THE PETITION

REVIEW IS WARRANTED BECAUSE THE LOWER COURT'S DECISIONS IN *WILLIAMS II* AND *WILLIAMS III* CONFLICT WITH THIS COURT'S DECISION IN *HOPE V. PELZER*

Judge Tjoflat, in his dissenting opinion in *Williams III*, found that "The panel erroneously construed the antidiscrimination law of this circuit as a discrete set of points [identifying decisions with the following holdings: cannot discriminate in hiring; cannot fire due to race; cannot fire to replace person with someone of a different race; cannot decline to fill vacancy on racial grounds; cannot differently discipline persons of different races; cannot fail to promote based on race; cannot tailor race-neutral requirements for a job to ensure that only persons of certain race will satisfy them.]" *Williams III*, 381 F.3d at 1304. This rationale by the majority in *Williams III* runs contrary to the concurring opinion of Justice O'Connor in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In that decision, Justice O'Connor stated:

> *Any deliberate attempt to maintain racial balance whatever such a balance may be, would involve a violation of Title VII* because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.

Id. at 274 (emphasis added)

The Eleventh Circuit's struggle with the concept of "clearly established" law, in the context of qualified immunity, is well documented in the pending decision styled *Evans v. City of Zebulon*, 351 F.3d 485 (11th Cir. 2003), *vacated by, reh., en banc, granted by Evans v. City of Zebulon*, 364 F.3d 1298 (11th Cir. Oct. 14, 2004)[3] The Plaintiffs in that case were stopped for speeding in Zebulon, Georgia and were arrested on suspicion of driving while intoxicated and parole violation. The Plaintiffs are African American, and the arresting officer/Defendant is white. Plaintiffs sued the officer, Stephens, in his individual capacity, under Section 1983, alleging that he should be denied qualified immunity. The District Court refused to grant summary judgment to the officer/Defendant, on the issue of qualified immunity, but a panel of the Eleventh Circuit reversed. The full Court has since agreed to rehearing *en banc*, due to the confusion in the Eleventh Circuit concerning what amounts to "clearly established" law.

The Plaintiffs in *Zebulon* contended that there was no basis for a strip search, but that officer Stephens conducted such a search in a degrading manner. Specifically, Plaintiffs alleged that officer Stephens used physical and verbal abuse, including racial epithets, and used a slender object to contact their anuses and genitals ("Stephens then pulled Jordan's underwear down and placed the slender black object between Jordan's buttocks, jabbing his anus. Jordan, startled, jumped, and the officers laughed and giggled.") 351 F.3d at 488.

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[3] The parties in *Zebulon* have briefed the Eleventh Circuit on the Plaintiff's Motion for Rehearing *En Banc*, and the Court had scheduled oral argument on October 26, 2004, but the Court had not yet rendered its decision as of the date of this petition.

In its panel decision, the Eleventh Circuit agreed that the strip search was unconstitutional, but nevertheless decided that qualified immunity should shield Officer Stephens, stating:

> Stephens is entitled to qualified immunity, however, because as of January 22, 1999, the law was not clearly established that an arrestee could not constitutionally be strip searched under the conditions alleged.

Zebulon, 351 at 492

Judge Robert B. Propst, United States District Judge for the Northern District of Alabama, sitting by designation, dissented in part from the Eleventh Circuit's decision in *Zebulon*. Referring to the "obvious cruelty" of the conduct, Judge Propst would have held that officer Stephens was on notice that his conduct was unlawful, because an earlier decision of this Court had "...established the law, at least by general statements." *Id.* at 497. (Referring to *Bell v. Wolfish*, 441 U.S. 520 (1979))

Judge Propst also noted that this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002) had already put the Eleventh Circuit on notice that it was improper to demand facts that were "fundamentally similar" or "materially similar" before denying a government actor the protection of qualified immunity. Judge Propst quoted the following language from *Hope*, which had been critical of an earlier decision by the Eleventh Circuit:

> This rigid gloss on the qualified immunity standard, though supported by Circuit precedent, is not consistent with our cases.

Zebulon, 351 F.3d at 497 (Propst, dissenting)

Judge Tjoflat, in the case at bar, was similarly troubled by his Court's difficulty in determining what "clearly established" law was, in order to comply with this Court's decision in *Hope*. Judge Tjoflat felt that the case at bar presented a perfect opportunity to resolve this shortcoming. In his dissenting opinion in *Williams III*, Judge Tjoflat wrote:

> Our post-Hope decisions demonstrate that we have not yet achieved a consensus on what the elusive phrase "clearly established" means. In particular, we do not have a unified standard on how to interpret our holding in *Vinyard v. Wilson*, 311 F.3d 1340,1351 (11th Cir. 2002) that "some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts." *This case [Williams III] is the perfect vehicle for explaining the reach of this crucial holding in Vinyard.*

Williams III, 381 F.3d at 1306 (brackets, italics added)

The Eleventh Circuit has yet to articulate a workable and consistent standard for determining whether "clearly established" law exists, in the context of qualified immunity. Because of its inability to make this determination, governmental actors are improperly being shielded from liability for conduct that is in violation of "clearly established" law, to the detriment of those they serve. This

Court should grant the petition to correct this matter of exceptional importance.

Review is Warranted Because the Lower Court's Decisions in *Williams II* and *Williams III* Utilized an Improper Standard for Determining Whether Respondent's Conduct Violated Clearly Established Law, Resulting in an Unjust Decision

The defense of qualified immunity is evaluated using a two prong test. First, it must be determined whether, if true, the allegations made by the plaintiff established that a constitutional violation of rights has occurred. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Even if the plaintiff is successful in proving a violation occurred, he or she must then show that the official who violated those rights should not be entitled to qualified immunity because those rights have been clearly established. *Post v. City of Fort Lauderdale,* 7 F.3d 1552 at 1557 (11th Cir. 1993). In 2002, the Supreme Court held in *Hope v. Pelzer*, 536 U.S. 730 (2002), that "the salient question...is whether the state of the law [at the time of the event] gave respondents fair warning that their alleged treatment [of the plaintiff] was unconstitutional. *Id* at 741.

The purpose of qualified immunity is to protect government officials so that "before they are subjected to suit, officers are on notice that their conduct is unlawful." *Saucier* at 206. A government officer or official is only on notice if the law is clearly established. *Id.* Before *Hope* was decided in 2002, it was much more difficult to show that the law was clearly established. The test that was commonly utilized required that the facts of the case be "materially similar" to those of a previous case in order for the court to find the law to be clearly established. *Harlow v. Fitzgerald*, 457 U.S. 800 at 881 (1982). In particular, the Eleventh Circuit required "if

case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v. City of Ft. Lauderdale*, 7 F.3d 1552 at 1559 (11th Cir. 1993).

This Court has since moved away from such stringent requirements. In *U.S. v. Lanier,* 520 U.S. 259 (1997), for example, the Court rejected the requirement that the facts be "fundamentally similar" to a previous case, in order for a government official to forfeit his qualified immunity, holding:

> ...general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, *even though the very action in question has [not] previously been held unlawful.*

Id. at 271 (emphasis added)

The Court elaborated on this issue in *Hope v. Pelzer* by rejecting the Eleventh Circuit's "rigid gloss on the qualified immunity standard" that required a materially similar factual situation. *Hope* at 739. The Eleventh Circuit's decisions in *Williams II and III*, 341 F.3d 1261 (11th Cir. 2003), *reh.den.* 381 F. 3d 1298 (2004), seemingly disregard this Court's decision in *Hope*.

Instead of applying the *Hope* standard (*i.e.*, whether the state of the law put the defendant on notice that his actions were unconstitutional) the Eleventh Circuit reverted to its pre-*Hope*, more rigid rule that if no previous case had found virtually the exact conduct to be unconstitutional, it was not "clearly established." *Williams III* 381 F.3d at 1300.

Notably, there is no mention of *Hope* in *Williams III*, save for the dissenting opinions by Judges Tjoflat and Barkett.

In his dissenting opinion, Judge Tjoflat wrote that "the panel erred in looking for a prior case in which the defendant took race into account in making the *exact* employment related decision that Alfred made." *Williams III* at 1304. He further stated "we have never forced a plaintiff to point us to a case in which a prior government official made the same exact racially discriminatory decision." *Id* at 1303-1304. Judge Barkett similarly stated:

> I agree with Judge Tjoflat that *en banc* review is warranted in this case. Under the panel's own analysis, its qualified immunity holding cannot be reconciled with the Supreme Court's decision in Hope v. Pelzer, 536 U.S. 730 (2002).***Once committed to the proposition that Chief Alfred's action, although 'significantly different than the types of discriminatory employment actions we formerly found unlawful,' was 'essentially an intentionally discriminatory race-and-gender based employment decision," id. (emphasis added), Hope requires that we consider his action to be a violation of a clearly established law.

Id. at 1308

In *Smith v. Lomax*, 45 F.3d 402 (11th Cir. 1995) the Eleventh Circuit did not require a factually similar precedent in order to find that the Defendants were on notice that their actions were unlawful. In that case the defendants, county commissioners, voted to replace a white female county clerk with a black female, admittedly due to race. In finding that qualified immunity did not apply, simply because the discrimination was obvious, the Court stated:

> We need not engage in a lengthy discussion of the patently obvious illegality of racial discrimination in public employment at the time the appellants voted to replace Smith. As we stated in *Yeldell,* "it can hardly be argued that in ... 1989, when the events leading up to this lawsuit [took] place ... intentional race discrimination in the workplace" did not violate the Fourteenth Amendment. 956 F.2d at 1064 (citing Washington v. Davis 426 U.S. 229, 239-41 (1976)

Id. at 407

In the immediate case, Chief Alfred's deliberate attempt to maintain a racial balance, without any affirmative action plan in place, was also patently illegal, even without reference to any earlier case with similar facts. Because the Eleventh Circuit has used an improper standard, however, it wrongly determined that Chief Alfred was entitled to qualified immunity, thereby reversing the decision of the District Court, which had refused to grant summary judgment in favor of Respondent on that issue. This Court should rectify this situation by vacating the decisions in *Williams II* and *Williams III*, and reinstating the decision of the District Court with regard to the qualified immunity issue.

YELDELL CONSTITUTED CLEARLY ESTABLISHED LAW

Because the Eleventh Circuit has applied an inappropriately rigid test, it has even mistakenly distinguished its own earlier precedent in *Yeldeil v. Cooper Green Hospital, Inc.,* 956 F.2d 1056 (11th Cir. 1992), to separately reach the erroneous conclusion that the law violated by Chief Alfred was not "clearly established." In *Yeldell*, the white female plaintiff was employed as a temporary nursing supervisor. *Id*

at 1059. She was removed in favor of a black woman and the position was then made permanent. *Id.* "Ms. Cremer [the plaintiff] contends that Commissioner Davis [a black male] permitted the creation of this position to go ahead only when a suitable black person could be found to take the job." *Id* at 1065.

In Judge Tjoflat's dissent in *Williams III*, he pointed out that "*Yeldell* is materially indistinguishable from the instant case." *Id* at 1305. In both cases, the plaintiffs were white and were in line for a promotion to a job to be permanently created at the discretion of a black supervisor. *Id.* In *Yeldell*, the position was only made permanent when a suitable minority candidate was located. In the case at hand, Chief Alfred held off from creating four new rescue captain positions in order to wait for a minority candidate to become available. *Id* at 1306. The majority in *Williams III* held that *Yeldell* did not provide notice, however, on the basis that the job of nursing supervisor in that case was *already in existence*, albeit in only an "acting" capacity. *Id* at 1299. The majority felt that since Petitioners in this case did not hold the job of Rescue Captain, even on a temporary basis, (*i.e.*, the positions were not *in existence* at the time of the decision) the facts of the cases were too different to provide Chief Alfred notice that his actions were in violation of a constitutionally protected right. *Id* at 1299-1300.

In reaching this decision, however, the majority in *Williams III* erroneously followed the 'materially similar' approach that has since been replaced by the fair notice standard from *Hope*. Moreover, the only "difference" between *Yeldell* and the case at bar is that in *Yeldell* the plaintiff occupied the position on a temporary basis, before it was "created" as a permanent position for a candidate of the desired racial demographic. *Yeldell* nevertheless stands for

the principle that the *creation* of a position cannot lawfully be delayed to exclude a candidate of one race, in order to preserve it for an eventual candidate of a different race. This is precisely what took place in the case at bar. Under the standard articulated in *Hope*, a reasonable official in Chief Alfred's position was on fair notice that delaying the creation of several positions, for the purpose of excluding white candidates, to keep the positions available for eventual minority candidates, violated clearly settled law.

CONCLUSION

The petition for writ of certiorari should be granted. The majority opinions in *Williams II* and *III* conflict with the holding of this Court in *Hope*. Moreover, because the Eleventh Circuit applied an incorrect standard, it erroneously determined that the law violated by Chief Alfred was not "clearly established" at the time he violated it. This resulted in the unjust decision by the Eleventh Circuit that the District Court's Order denying summary judgment to Chief Alfred in his individual capacity be reversed.

This case presents an excellent opportunity for this Court to more clearly articulate the standard to be used, when determining whether a matter of constitutional law has been clearly established, as contemplated in *Hope v. Pelzer*. For these reasons, the Court should vacate the decisions of the Eleventh Circuit decided on August 14, 2003, and August 27, 2004. The Court should articulate the standard for the Eleventh Circuit to use on remand, and should instruct the Eleventh Circuit that there need be no precedent of virtually identical facts, in order to give a government actor fair notice about the illegality of racially discriminatory personnel decisions in public employment. Respondent should be denied summary judgment on the issue of qualified immunity.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14191

[Filed August 27, 2004]

GEORGE A. WILLIAMS,	)
MICHAEL A. PERRYMAN, et al.,	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
CONSOLIDATED CITY OF JACKSONVILLE,	)
RAYFIELD ALFRED, Fire Chief, in his	)
individual and official capacities,	)
Defendants-Appellants.	)
	)

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 00-00469-CV-J-12

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK CARNES, BARKETT, HULL, MARCUS, WILSON and PRYOR, Circuit Judges.

ON PETITION FOR REHEARING EN BANC

BY THE COURT:

The Court having been polled at the request of one of the members of the Court and a majority of the circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedures; Eleventh Circuit Rule 35-5), the Petition for Rehearing En Banc is DENIED.

/s/ J. L. EDMONDSON
CHIEF JUDGE

CONCUR

WILSON, Circuit Judge, Concurring in the Denial of Rehearing En Banc:

I respectfully write a brief response to my colleagues who have dissented from the denial of rehearing en banc.

This was a qualified immunity case. The opinion[1] concludes that Rayfield Alfred, Fire Chief for the Consolidated City of Jacksonville, Florida, was entitled to qualified immunity when he postponed creating four new captain positions, based allegedly on the premise that the next available candidates on the eligibility list were white males. At the time, eight consecutive white males had previously been promoted. Alfred, an African-American, was newly appointed by Jacksonville's mayor from outside the

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[1] *Williams v. Consol. City of Jacksonville*, 341 F.3d 1261 (11th Cir. 2003).

department, in an effort to address the department's prior reputation for nepotism and racism. Although Alfred had discretion over whether to fill vacancies, he also had authority to create new positions within the Department. According to the testimony of a number of witnesses, Alfred delayed the creation of new positions in an effort to obtain a more diverse applicant pool, a pool that would also have included the plaintiffs. His decision resulted in plaintiffs' complaint pursuant to 42 U.S.C. § 1983 *inter alia*.

First, I agree with Judge Tjoflat that Fire Chief Alfred's conduct in *Williams* violated the constitutional rights of the plaintiffs. While the opinion recognizes that the action taken in this case was significantly different from the type of discriminatory conduct our Circuit has previously found unlawful, the opinion states unequivocally that a decision not to create new jobs, based solely on the race and gender of the next eligible applicants, in the absence of an affirmative action plan, violates the Equal Protection Clause. *See Williams v. Consol. City of Jacksonville*, 341 F.3d at 1269. If Alfred committed similar conduct today, he would be held responsible. Where I disagree with the dissenters, however, is whether clearly established law had placed Alfred on notice of this misconduct so as to strip him of his entitlement to qualified immunity.

No Eleventh Circuit or Supreme Court authority would have established to Chief Alfred that he could not hold up on creating new jobs until there was a more diverse applicant pool. We were unable to determine that the "contours of [the] right [were so clearly established] that a reasonable official would have understood his acts were unlawful." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993). "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Id.*

Our Circuit has repeatedly stated that qualified immunity provides complete protection for public officials from liability in their individual capacities except "all but the plainly incompetent or one who is knowingly violating federal law." *Willingham v. Loughnan*, 261 F.3d 1178, 1187 (11th Cir. 2001). "That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against the claims made against them in their *individual capacities*." *Lassiter v. Alabama A & M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc).

Our decision in *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056 (11th Cir. 1992), upon which the dissenters primarily hang their hats, is unavailing. *Yeldell* involved the actual hiring and firing for an **existing** job. Karan Cremer, a plaintiff in *Yeldell*, was removed from her job and replaced by a person of another race. *Yeldell* could not possibly have "clearly established" the impropriety of the conduct in the present case. Here, no job was ever created in the first instance. In fact, (1) no final decision had even been made as to whether the new positions would **ever** be created at all, and (2) if and when the positions were created, the new vacancies would be filled through a race-neutral hiring procedure, to which plaintiffs did not object, and in which they would have been permitted to compete.

Judge Tjoflat argues in dissent that the major point of difference between *Yeldell* and *Williams* – the fact that in *Yeldell*, Cremer was permitted to serve in the position on a "temporary" basis, – is not sufficient "to remove Alfred's decision from the realm of *Yeldell*." Tjoflat dissent at 14. However, the simple truth is that in *Yeldell*, regardless of the hospital's nomenclature regarding the position, Cremer held the position of nursing supervisor at the time the unlawful

employment decision was made. She was, as far as we know, engaged in every function of the eventual permanent position. This simply was not the case in *Williams*.

Here, all that can be said of Chief Alfred is that he decided not to create severally entirely new supervisory positions, a situation that is factually quite distinct from one in which an individual is terminated or removed from his or her position solely on the basis of race. The plaintiffs in *Williams* did not apply for existing captain's positions, and then see those jobs go to individuals of another race. Moreover, the plaintiffs were not serving in the positions before being terminated and replaced on account of race, as was the case in *Yeldell*. No position was ever created that could be filled by an individual of any race, let alone someone of a different race. No matter how much the facts of *Yeldell* are stretched, the case simply did not presage the situation presented here.

The dissenters' reliance upon *Smith v. Lomax*, 45 F.3d 402 (11th Cir. 1995) is equally unavailing. In *Lomax*, the Board of County Commissioners of Fulton County, Georgia, voted to replace its white female clerk with an African-American female, at the conclusion of her six-year term. *See id.* at 403. Two African-American board members voted not to replace the clerk, allegedly on the basis of race. *See id.* The dissenters rely on *Lomax* as an expression of the general prohibition of racial discrimination in public employment. However, in spite of whatever general principles *Lomax* states, it narrowly and clearly frames its actual issue in terms of whether, at the time the commissioners cast their votes to terminate and replace the plaintiff, *that particular action* violated the plaintiff's constitutional rights. *See id.* at 407 ("[T]he question we must answer is whether at the time appellants exercised the discretionary function of casting their

votes . . . their conduct violated a clearly established constitutional right of which a reasonable person would have known.") (quotation marks and citation omitted). Again, Lomax, like *Yeldell,* dealt with a race-based termination from and filling of an existing job, and it was filled by someone of another race. There is no dispute that the type of action prohibited in *Lomax* – racially-motivated **discharge** – had previously been established in our case law. *See Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1478 (11th Cir. 1991).

In sum, no case existed in 1999 that clearly established the unconstitutionality of the conduct in *Williams*. Until *Williams*, we had not yet dealt with a situation in which a decision-maker opted not to create entirely new jobs on the basis of race. In fact, as far as I am able to determine, no Circuit has to date. In addition, in *Williams*, the parties never even reached the point where an actual employment decision as to hiring or firing could have been made; the captain positions simply had not been created. Eleventh Circuit case law in no way previously had proscribed such conduct. Thus, while I agree fully with Judge Tjoflat that Alfred's conduct was unconstitutional, it certainly had not been clearly established as unconstitutional at the time in question. Consequently, en banc review was unnecessary.

DISSENT

TJOFLAT, Circuit Judge, Dissenting from the Denial of Rehearing En Banc:

This case involves a city official, Jacksonville Fire Chief Rayfield Alfred, who refused to create new positions within the Jacksonville Fire Department because he did not want them to be filled by people of a certain race. He comes before

this court arguing that neither the Constitution nor the federal judiciary had given him sufficient warning that the Equal Protection Clause prohibits government officials from basing decisions of any sort, especially employment-related decisions, on racial considerations.[1] He argues that the law did not "clearly" prohibit him from discriminating against certain employees by denying them promotional opportunities based on their race.

For what may very well be the first time since *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), a panel of this court agreed, holding that the defendant lacked reasonable notice that racial discrimination of this sort is unconstitutional. Because I believe that the defendant's behavior violated one of the Constitution's most fundamental tenets–thou shalt not base official governmental decisions on race–I respectfully dissent from this court's en banc refusal to hold Alfred accountable.

Part I of this dissent offers a brief overview of both the facts and the panel's ruling. Part II explains how Chief Alfred's acts violated "clearly established law" in two different ways. First, his specific acts had already been held unconstitutional in *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1065 (11th Cir. 1992). Second, his acts violated clearly established constitutional principles that prohibit government officials from taking race into account (outside the narrow context of certain bona fide affirmative action programs), both in general, and in the specific context of making decisions pertaining to government employment, see

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[1] The sole possible exception is the operation of a bona fide remedial affirmative action program. It is undisputed that no such program exists here.

Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995). Part III sets forth the factors that make this a question of exceptional importance and hence worthy of en banc consideration under Federal Rule of Appellate Procedure 35(a).[2] Part IV briefly concludes.

I.

Promotion within the upper tiers of the Jacksonville Fire Department is based upon the results of a standardized test administered every two years. Every candidate for promotion must take this test and is ranked solely according to his or her test score. Candidates must be promoted into available leadership slots according to the order in which they are ranked on this list. When a new test is administered, the results of the previous test automatically expire; to remain eligible for promotion, each applicant must take the new test.

In 1997, the Department administered one of these tests to determine eligibility for promotions; the results were to expire toward the end of October, 1999. Of the eight top scorers, seven were white males and one was a Hispanic male. All were promoted from lieutenant to captain. The next four highest scorers, who were next in line for promotion, were all white males.

In October, 1999, nine days before the results of the 1997 test expired, the chief of the Department's rescue division,

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[2] This rule provides in relevant part, "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

Thomas McCrone, spoke with Chief Alfred about the possibility of creating four new "roving captain" positions. Chief Alfred declared that while "the concept of the positions and the justification for them were good," he "wanted to wait for a new [promotion] list, because he did not want to promote four white men to the new positions, as he had already promoted eight white men [including the Hispanic male] from the 1997 eligibility list." Alfred wanted to wait for the new list in the hope that his next promotions would better "reflect the diversity of the fire department." It is undisputed that this was an ad hoc decision of Alfred and was not part of a bona fide, formal affirmative action program (and it is far from clear that under the circumstances of this case such a program would have been constitutional).

The next four highest scorers from the 1997 promotion list, who would have filled the roving captain positions had Alfred created them, sued Alfred under 42 U.S.C. §§ 1981 and 1983; Title VII, 42 U.S.C. §§ 2000e to 2000e-17; and the Florida Civil Rights Act, Fla. Stat. §§ 760.01-760.11. They claimed that "in the absence of a valid affirmative action plan[,] Chief Alfred's decision not to create the roving captain positions amounted to unlawful race and gender discrimination."

The plaintiffs brought suit against Chief Alfred in his individual and official capacities. Alfred moved to dismiss the suit against him in his individual capacity on qualified immunity grounds. The district court denied this motion, holding that the plaintiffs had adequately stated a cause of action. This court affirmed on interlocutory appeal. *Williams v. Consol. City of Jacksonville*, 268 F.3d 1067 (11th Cir. 2001) (unpublished table decision). We stressed, however, that "[f]urther proceedings will determine whether the Appellant is entitled to qualified immunity." *Id.*

After discovery, Alfred moved for summary judgment on qualified immunity grounds. Again, the district court rejected his motion. The panel, however, reversed. *Williams v. Consol. City of Jacksonville*, 341 F.3d 1261 (11th Cir. 2003). It began by noting that Chief Alfred was acting within his discretionary authority in deciding whether to create the four new roving captain positions. Consequently, the burden shifted to the plaintiffs to demonstrate that Alfred was not entitled to qualified immunity. The panel explained that, to overcome this burden, the plaintiffs must demonstrate (1) that they alleged a violation of a constitutional right, and (2) that this right was clearly established at the time of the alleged violation. *See id.* at 1268-69. I enthusiastically endorse the panel's resolution of the first issue--that "a decision not to *create* new positions that is based solely upon the race and gender of the next eligible candidates for promotion, in the absence of a valid affirmative action plan, violates the Equal Protection Clause." *Id.* at 1269 (emphasis in original). It is the panel's second holding–that this right was not "clearly established" in 1999, at the time of Alfred's acts–with which I take serious issue.

II.

This circuit has held that a right can be "clearly established" in one of three ways. "First, the words of the pertinent federal statute or federal constitutional provision in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, *even in the total absence of case law.*" *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (emphasis in original). The general language of the

Equal Protection Clause[3] is not, in itself, enough to "clearly establish" Chief Alfred's acts as unconstitutional.

Second, "some broad statements of principle in case law" can be sufficient to "clearly establish" conduct as unconstitutional. *Id.* at 1351. For example, we have held that the general principle against warrantless searches and seizures established in a variety of cases was enough to "clearly establish" that a probation officer's warrantless entry into a doctor's office to look for a probationer was unconstitutional. *See O'Rourke v. Hayes*, No. 03-10795, 378 F.3d 1201, 2004 U.S. App. LEXIS 15450, at *16 (11th Cir. July 27, 2004) ("Hayes did not have a search warrant, and can point to no exigency justifying his search. Consequently, even if a factually similar case did not exist, his actions would still have violated rights that are clearly established under these general statements of principle."). Similarly, we have held that the doctrinal test for establishing whether an act is expressive conduct protected by the First Amendment is sufficiently specific and easy to apply that a high school senior's right to silently raise his fist in protest during a school's daily recitation of the Pledge of Allegiance was "clearly established." *See Holloman v. Harland*, 370 F.3d 1252, 1279 (11th Cir. 2004) ("Because this standard is 'clearly established,' is not at an unreasonabl[y] high level of generality, and when applied to the facts of Holloman's case yields a fairly determinate result that should have been clear, Allred and Harland are not entitled to summary judgment on qualified immunity grounds."). Section A of this Part discusses the clearly established Equal Protection principle against racial discrimination, both in general and in the

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[3] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

specific context of decisions concerning public employment, that Alfred flouted.

The final way in which a constitutional right can be "clearly established" is if there is a case with indistinguishable material facts that established the government official's conduct as unconstitutional. *See Vinyard*, 311 F.3d at 1351 ("[I]f the circumstances facing a government official are not fairly distinguishable, that is, are materially similar," to the facts of a previous case, that "precedent can clearly establish the applicable law."). Section B of this Part analyzes how Alfred's conduct had squarely been held unconstitutional in *Yeldell*, 956 F.2d 1056.

A.

The first way in which Chief Alfred's acts had been "clearly established" as unconstitutional is through statements of generally applicable principle in binding precedents. Both the Supreme Court and this court have repeatedly declared that, with the possible exception of bona fide affirmative action programs, it is categorically improper for the government to base decisions or official action of any sort–particularly employment decisions–upon race or racial considerations. *See, e.g., Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L. Ed. 2d 597 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); *Lomax*, 45 F.3d at 407 ("We need not engage in a lengthy discussion of the patently obvious illegality of racial discrimination in public employment at the time the appellants voted to replace Smith."); *Yeldell*, 956 F.2d at 1064 (11th Cir. 1992) ("[I]ntentional race discrimination . . . [is] frowned upon by the laws of this society."); *Brown v. City of Fort Lauderdale*,

923 F.2d 1474, 1478 (11th Cir. 1991) (recognizing that "the equal protection right to be free from intentional racial discrimination" is "clearly established").

As the Supreme Court declared in *Miller v. Johnson*, the Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking." 515 U.S. 900, 904, 115 S. Ct. 2475, 2482, 132 L. Ed. 2d 762 (1995). This principle applies with particular force to employment-related decisions. *See Alexander v. Fulton County*, 207 F.3d 1303, 1321 (11th Cir. 2000) ("[T]here can be no doubt that . . . it was clearly established that intentional discrimination in the workplace on account of race violated federal law."). While there may be a narrow exception to this rule for bona fide affirmative action programs, such an exception would not permit government officials to engage in ad hoc race-based decisionmaking at will. *See Bennett v. Arrington*, 20 F.3d 1525, 1540 (11th Cir. 1994) ("It is, however, a necessity that some finding be made that the City engaged in past discrimination, in order to allow for proper judicial review of the City's use of race in its affirmative action plan.").

Notwithstanding these principles, the panel held that Alfred had not violated a "clearly established" constitutional right of the plaintiffs. In reaching this conclusion, the panel focused on the fact that we had never before decided a case in which an employer had refused to create a new position. The panel explained that prior Eleventh Circuit cases "dealt with typical employment decisions that were made concerning an existing vacancy or a viable position. The decision at issue here, however, was whether or not to *create* four new high-level positions." *Williams*, 341 F.3d at 1272-73 (emphasis in original).

I believe that the above-cited cases would have put any reasonable governmental official on notice that, absent a valid affirmative action plan, race is generally a suspect basis upon which to make any sort of decision, especially a decision in the area of governmental employment. The panel erred in looking for a prior case in which the defendant took race into account in making the exact employment-related decision that Alfred made. Modern constitutional law's prohibition against racial discrimination is sufficiently broad and well-established that such specificity in precedent is unnecessary.

The panel erroneously construed the antidiscrimination law of this circuit as a discrete set of points: you may not discriminate in hiring decisions, *see Batey v. Stone*, 24 F.3d 1330, 1333 (11th Cir. 1994); you may not fire someone because of his or her race, *see Brown*, 923 F.2d at 1478; you may not fire someone for the purpose of replacing him or her with someone of a different race, *see Lomax*, 45 F.3d at 407; you may not decline to fill a vacancy on racial grounds, *see Dumas v. Town of Mount Vernon*, 612 F.2d 974, 980 (5th Cir. 1980)[4]; you may not discipline someone for an infraction unless people of all races are similarly disciplined when they commit the same infraction, *see Alexander*, 207 F.3d at 1336; you may not fail to promote someone based on his race, *see id.* at 1339; and you may not tailor race-neutral requirements for a job so as to ensure that only people of a certain race will satisfy them, *see Yeldell*, 956 F.2d at 1065. The panel's view, that each of these cases establishes nothing more than a discrete and insular point of law, is erroneous.

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[4] This case also involved a statute-of-limitations issue that was the subject of a complex series of subsequent cases that do not affect the validity of the principle for which it is cited above.

Moreover, Eleventh Circuit precedents in which we denied government actors qualified immunity for engaging in race-based decisionmaking have relied upon the general antidiscrimination norms to which I refer. We have never forced a plaintiff to point us to a case in which a prior government official made the same exact racially discriminatory decision. For example, in *Lomax*, the plaintiff was a white county clerk who sued members of the Fulton County Board of Commissioners for voting to fire her so that it could hire a black clerk. Nowhere in that case's qualified immunity discussion did we cite any case in which members of a county board--or, indeed, any legislative body or government employer--voted to fire someone on racial grounds.

Instead, *Lomax* held:

> We need not engage in a lengthy discussion of the *patently obvious illegality of racial discrimination in public employment* at the time the [defendants] voted to replace [the plaintiff]. As we stated in *Yeldell*, "it can hardly be argued that in . . . 1989, when the events leading up to this lawsuit [took] place . . . intentional race discrimination in the workplace" did not violate the Fourteenth Amendment. . . . Given *the clear state of the law prohibiting racial discrimination in public employment* at the time the Board voted to replace [the plaintiff], no reasonable commissioner, with the information possessed by [the defendants], would have believed that his or her discriminatory actions were constitutional.

45 F.3d at 407 (emphasis added). Under a faithful application of *Lomax*, Alfred is not entitled to qualified immunity.

The law of this circuit–indeed, the law of this nation–is (and was in 1999) that, outside of certain narrow circumstances totally inapplicable to this case, a government official may not base decisions, particularly employment decisions, on racial grounds at all. This fact would have been readily apparent to a reasonable government actor considering the above-cited litany of cases and the statements of general principle they articulate.

B.

The other way in which Alfred's acts were "clearly established" as unconstitutional is through our decision in *Yeldell v. Cooper Green Hosp.*, 956 F.2d 1056, in which we allowed a suit against a government official who engaged in the same type of reverse-discrimination as Alfred. Plaintiff Karan Cremer, a white woman, was the temporary nursing supervisor for maternal/infant care for the defendant, Cooper Green Hospital. Another defendant, Jefferson County Commissioner Reuben Davis, a black man, was in charge of the hospital's personnel decisions. Cremer claimed that Davis declined to create a permanent maternal/infant care supervisor position until he found a black woman, Elizabeth Bone, to apply for it. We stated,

> Ms. Cremer contends that Commissioner Davis permitted the creation of this position to go ahead only when a suitable black person could be found to take the job. Ms. Cremer further contends that her masters degree and greater experience made her better qualified for the position than Ms. Bone and that she was not selected solely because of her race.

Id. at 1065. We denied Davis qualified immunity against this claim, holding that "the laws allegedly violated by Commissioner Davis were clearly established." *Id.* at 1064.

Yeldell is materially indistinguishable from the instant case. Both the plaintiff in *Yeldell* and the plaintiffs here are Caucasian. Both the defendant in *Yeldell* and the defendant here are African-American. Both defendants decided to delay the creation of new positions–a new permanent nursing supervisor position in *Yeldell*, and new roving captain positions in the instant case–because the person most likely to fill each position was Caucasian. Both defendants decided to hold off on creating or filling those new positions until a later time when there was a greater chance of recruiting a minority. Neither defendant acted pursuant to a bona fide affirmative action program.

The only arguable variation between *Yeldell* and the instant case is that Cremer was permitted to act as a "temporary" nursing supervisor until a permanent position was created, while the white men who would have filled the permanent roving captain positions were not temporarily acting in that capacity at the time of Alfred's decision, though they were later designated acting captains "on a provisional basis." I do not believe this one fact is enough to remove Alfred's decision from the realm of *Yeldell*. If our law "clearly" prohibited such discriminatory behavior in 1992 when *Yeldell* was decided, it necessarily continued to do so in 1999.

III.

For this court to review en banc a panel ruling, the ruling must not only be erroneous, but also involve a "question of exceptional importance." Fed. R. App. P. 35(a)(2). The

panel's ruling meets this standard because it implicates two critically important areas: qualified immunity and race. I will explore each separately.

A.

Section 1983 is virtually the only way in which victims of constitutional violations by state and local officials can vindicate their fundamental rights. Requiring that rights be "clearly established" with an unreasonably high degree of specificity leaves individuals vulnerable to constitutional travesties while allowing government officials to evade responsibility.

In *Hope v. Pelzer*, the Supreme Court declared that we had placed a "rigid gloss on the qualified immunity standard" that was "not consistent with [its] cases." 536 U.S. 730, 739, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002). Our post-*Hope* decisions demonstrate that we have not yet achieved a consensus on what the elusive phrase "clearly established" means. In particular, we do not have a unified standard on how to interpret our holding in *Vinyard v. Wilson*, 311 F.3d 1340, 1351 (11th Cir. 2002), that "some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts." This case is the perfect vehicle for explaining the reach of this crucial holding in *Vinyard*. Consequently, if reheard en banc, this case would have had enormous precedential value and could dramatically clarify the law to the benefit of future parties and panels.

In this particular case, the exact qualified immunity standard we apply is not important. Alfred's behavior was so patently unconstitutional, so clearly prohibited by precedent, that he could not expect immunity under any reasonable

standard. However we choose to interpret the phrase "clearly established law," even a brief consideration of Alfred's acts reveal them to be beyond the bounds of constitutional propriety. The hair that the panel sought to split–that no previous case had involved an employer declining to create a new position on racial grounds[5]–is unpersuasive. The panel's approach requires a degree of specificity in precedent that none of our prior opinions demands and that effectively eviscerates our circuit's repeated condemnation of all racial discrimination and race-based decisionmaking in public employment.[6]

Qualified immunity is meant to ensure that government officials are not afraid to fulfill their job-related responsibilities. *See Richardson v. McKnight*, 521 U.S. 399, 408, 117 S. Ct. 2100, 2105, 138 L. Ed. 2d 540 (1997) (noting that the purpose of qualified immunity is to "protect[] the public from unwarranted timidity on the part of public officials"); *Butz v. Economou*, 438 U.S. 478, 506, 98 S. Ct. 2894, 2911, 57 L. Ed. 2d 895 (1978) (noting that the purpose of qualified immunity is to "encourag[e] the vigorous exercise of official authority"). However, due regard for constitutional rights means that officials should tread lightly in matters fraught with constitutional underpinnings. We would not enjoy much true freedom if, whenever a government official had doubts as to the existence or scope of a constitutional right, he were always permitted to resolve them against that right. The "clearly established" prong of the qualified immunity test should not be interpreted or applied so as to

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[5] A position the panel cannot tenably maintain in light of *Yeldell*, *see supra* Section II.B.

[6] Again, with the possible exception of bona fide remedial affirmative action programs.

encourage every public official to consistently resolve every question or hesitation against individual rights and liberty.

Furthermore, if the "clearly established" prong of the qualified immunity test is interpreted unduly strictly, it will effectively prevent further development of wide areas of constitutional law. An attorney deciding whether to represent the victim of a constitutional violation will be extremely reluctant to bring a case when there is no precedent squarely on point. If an unreasonably high "clearly established" hurdle precludes many cases involving arguable constitutional violations from being brought, then the stream of precedents recognizing certain governmental acts as constitutional violations will dry up. This, in turn, will further reduce the number of "clearly established" constitutional violations, which will further reduce the number of § 1983 cases brought, and the cycle will continue. The Supreme Court recognized this concern in *County of Sacramento v. Lewis*, in which it held that courts performing a qualified immunity analysis must always begin by addressing the threshold question of whether a constitutional right has been violated, instead of simply assuming *arguendo* that a right was violated and then granting the defendant qualified immunity because the right was not clearly established at the time. 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 1714 n.5, 140 L. Ed. 2d 1043 (1998) ("[I]f the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals."). For these reasons, the proper scope of qualified immunity is a sufficiently important question as to warrant en banc reconsideration of this case.

B.

Racial controversies have plagued our country, and the South in particular, since the Founding Era; the objective importance of adjudicating a potential racial injustice cannot be gainsaid. Careful consideration of racial discrimination charges are always of "exceptional importance," not only to the parties involved, but to society at large. Thus, this case is extremely important not only because of the opportunity it presents to clarify qualified immunity jurisprudence, but precisely because it arises in a sensitive and fundamental area such as race.

IV.

Racial discrimination by government officials–regardless of the race of the victims–is blatantly unconstitutional. This principle is clear, and applies regardless of whether there is a Supreme Court or Eleventh Circuit case on point involving racial discrimination in *precisely* the same context. No government official could have reasonably believed in 1999 that ad hoc, race-based decisionmaking was constitutional. Moreover, Alfred's acts had already been squarely prohibited by *Yeldell*. For these reasons, the panel's decision is fundamentally flawed. Because it implicates both qualified immunity and race relations, the opinion warrants rehearing en banc. I dissent.

BARKETT, Circuit Judge, Dissenting from the Denial of Rehearing En Banc:

I agree with Judge Tjoflat that en banc review is warranted in this case. Under the panel's own analysis, its qualified immunity holding cannot be reconciled with the Supreme Court's decision in *Hope v. Pelzer*, 536 U.S. 730,

122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). In *Hope*, the Court found that our circuit's "rigid gloss on the qualified immunity standard," which required that the facts of previous cases be "materially similar" to those of the case under review, was "not consistent with [the Supreme Court's] cases." 536 U.S. at 739. *Intentional* governmental discrimination solely on the basis of race has been held to violate the Equal Protection Clause since long before the events that gave rise to this case. The panel found as much in holding in the first instance that

> a decision not to *create* new positions that is based solely upon the race and gender of the next eligible candidates for promotion, in the absence of a valid affirmative action plan, violates the Equal Protection Clause.

Williams v. Consolidate City of Jacksonville, 341 F.3d 1261 (11th Cir. 2003), 1269 (emphasis in the original). Once committed to the proposition that Chief Alfred's action, although "significantly different than the types of discriminatory employment actions we formerly found unlawful," was "essentially an *intentionally* discriminatory race-and-gender-based employment decision," *id*. (emphasis added), *Hope* requires that we consider his action to be a violation of clearly established law.

Moreover, if the panel's first holding is correct – that is, that a decision not to create a position for racial reasons violates equal protection – then that law seems to have been clearly established in *Yeldell v. Cooper Green Hospital*, 956 F.2d 1056 (1992). In *Yeldell*, we found that an employer's alleged decision not to create a position for which a temporarily employed white candidate would have been eligible until a black candidate could be found for the job

would violate clearly established law. *Id.* at 1064-65. As both the panel and Judge Tjoflat suggest, a decision not to create a position solely on the basis of race or gender would not fall afoul of the Fourteenth Amendment if undertaken pursuant to a valid affirmative action plan. Assuming that this exception is not at issue, *Yeldell* would seem to control here.

Whether the facts of *Yeldell* or, indeed, of this case, should be reconsidered to determine whether they implicate a valid affirmative action plan is another matter, and would itself have been worthy of en banc review.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-14191

[Filed August 14, 2003]

GEORGE A. WILLIAMS,
MICHAEL A. PERRYMAN, et al.,
Plaintiffs-Appellees,

v.

CONSOLIDATED CITY OF JACKSONVILLE,
RAYFIELD ALFRED, Fire Chief, in his
individual and official capacities,
Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida
D. C. Docket No. 00-00469-CV-J-12
Howell W. Melton, Judge

Before MARCUS and WILSON, Circuit Judges, and RESTANI*, Judge.

OPINION

WILSON, Circuit Judge:

This case arose out of Jacksonville Fire Chief Rayfield Alfred's decision not to create four new roving captain positions in the Fire Captain Rescue Division of the Jacksonville Fire and Rescue Department as proposed by a subordinate official. The plaintiffs, George A. Williams, Michael A. Perryman, Michael B. Price, and Nolan A. Sauls,[1] are four white lieutenants in the fire department who were passed over for promotion as a result of Chief Alfred's decision not to create the new positions. Alleging that Chief Alfred's decision amounted to race and gender discrimination, they filed a complaint pursuant to 42 U.S.C. §§ 1981 and 1983, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and the Florida Civil Rights Act of 1992 (FCRA), Fla. Stat. §§ 760.01-760.11, against the Consolidated City of Jacksonville and Chief Alfred in his individual and official capacities (collectively the defendants). After the district court denied the defendants' motion for summary judgment based upon qualified immunity as to the claims against Chief Alfred in his individual capacity, the defendants brought this interlocutory appeal, asserting that

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

[1] Sauls died on August 7, 2000, and his estate was substituted as a party in this action.

Chief Alfred is entitled to qualified immunity.[2] As we find that Chief Alfred is entitled to qualified immunity, we reverse and remand this case to the district court with instructions to enter summary judgment in favor of Chief Alfred as to the claims brought against him in his individual capacity.

BACKGROUND[3]

On November 1, 1995, Chief Alfred, a black man, was appointed by Mayor John Delaney to his current position as the director and chief of the fire department in Jacksonville, Florida. Mayor Delaney recruited Chief Alfred from Washington, D.C., where he previously served as fire chief. Chief Alfred was appointed because the fire department had a history of racism and nepotism and Mayor Delaney wanted to bring someone in from outside of the department to ensure that the department would be run in a race-neutral manner. Significantly, there was no affirmative action plan in place.

As fire chief, Chief Alfred has the authority to create new positions and the responsibility to fill vacancies within the fire department. In so doing, however, he does not enjoy absolute discretion, because his authority to promote within the ranks

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[2] Although this appeal was brought by the defendants as evinced by their Notice of Appeal, the appeal itself pertains only to the claims brought against Chief Alfred in his individual capacity. Thus, our holding applies only to those claims.

[3] For purposes of this appeal of the district court's denial of qualified immunity to Chief Alfred on summary judgment, the facts are construed "in the light most favorable to the plaintiff[s]," *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002), and "may not be the 'actual' facts of the case," *Priester v. City of Riviera Beach*, 208 F.3d 919, 925 n.3 (11th Cir. 2000).

of lieutenant, captain, and chief in the rescue division is limited to promoting from an eligibility list that is generated from a competitive written examination. Indeed, under the rescue division promotion system, which was devised pursuant to the City's contract with the Jacksonville Association of Firefighters, Local 122, an eligibility list is created from the certified results of a race-neutral examination that is administered solely for the purpose of determining who is eligible for promotion and the order in which those candidates will be promoted. To determine the order of promotion, eligible candidates are ranked according to their examination scores, and Chief Alfred must promote according to that order. In other words, when a vacancy opens or a new position is created, the next highest person on the eligibility list is promoted to that position. Once an examination is certified, the eligibility list is valid for two years, at which time it expires and a new examination is administered and a new eligibility list is generated. Thus, all candidates who remain on an eligibility list when it expires, but who wish to be considered for future promotions, must retake the examination and undergo the process anew.

In October of 1999, Thomas T. McCrone, the chief of the rescue division, approached Chief Alfred and proposed that he create four new captain positions in the rescue division, known as roving captain positions, and fill them from an eligibility list that was generated in 1997, but was set to expire in approximately nine days.[4] At that time, the plaintiffs were the next four candidates on the 1997 eligibility list; thus, if Chief Alfred had agreed to create the new positions, the

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[4] As the results of the examination were certified on October 14, 1997, the eligibility list was effective until October 14, 1999.

plaintiffs would have been promoted to the new positions.[5] After considering Chief McCrone's written proposal, however, Chief Alfred told Chief McCrone that he looked over the existing eligibility list and that he thought the concept of the positions and the justification for them were good, but that he preferred to establish a new list.[6] Allegedly, Chief Alfred wanted to wait for a new list, because he did not want to promote four white men to the new positions as he already promoted eight white men[7] from the 1997 eligibility list.[8]

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[5] Although they initially were ranked ninth (Williams), tenth (Perryman), eleventh (Sauls), and twelfth (Price), eight lieutenants already had been promoted to captain from the 1997 eligibility list; thus, the plaintiffs were the top four candidates on the list when Chief Alfred considered Chief McCrone's proposal.

[6] The roving captain positions never were created, but, after the 1997 eligibility list expired, a number of new captain vacancies arose in the rescue division and each of the three surviving plaintiffs, during the years 2000 and 2001, was appointed to one of those vacancies on a provisional basis. In November of 2001, however, a new exam was given, and a new eligibility list was created; the surviving plaintiffs, who had elected not to retake the exam in 2001, lost their temporary status as captains when the vacancies were filled from the new eligibility list.

[7] One of the eight men was white-hispanic.

[8] Indeed, Chief Alfred's underlying motivation, as understood by Chief McCrone, was articulated in a conversation that he had with Price, in which Chief McCrone told Price why the new positions would not be created. He explained, "'I have done everything I can do. It's out of my hands. Alfred said the next four people on the list do not reflect the diversity of the fire department.'" Price allegedly responded, "'So basically you're not doing this because we're not black?,'" to which Chief McCrone answered, "'Basically . . . .' 'It's out of my hands.'" Similarly, on

Subsequently, the plaintiffs filed this civil rights lawsuit[9] against the defendants pursuant to §§ 1981 and 1983, Title VII, and the FCRA, alleging that in the absence of a valid affirmative action plan Chief Alfred's decision not to create the roving captain positions amounted to unlawful race and gender discrimination in employment. The plaintiffs asserted that but for their racial or gender identity, "Chief Alfred would have implemented or created the four Roving Captain Rescue Division positions at the time he was requested to do so, and at the time the need for those positions arose, before the eligibility list expired."

In response, the defendants moved to dismiss the discrimination claims, asserting in part that Chief Alfred was entitled to qualified immunity for the claims brought against him in his individual capacity. The district court disagreed, however, finding that the "plaintiffs have alleged facts

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at least two other occasions, Chief McCrone repeated to others in the fire department that Chief Alfred's decision not to create the positions was due to his desire to have a more diversified list. Chief Alfred denied making this statement, however, claiming that his motivation was fiscal and economic and that any diversity concerns merely arose from a desire to promote from a larger, potentially more diverse applicant pool, and Chief McCrone has since recanted his explanation of why Chief Alfred did not create the positions. Accordingly, the district court recognized in its July 3, 2002 order that disputed facts exist as to the motivation behind Chief Alfred's decision not to create the roving captain positions. Nevertheless, as explained previously, for purposes of this interlocutory appeal, we accept the plaintiffs' version of the facts as true and need not determine the validity of the district court's evidentiary finding. *See Lee*, 284 F.3d at 1190.

[9] The complaint we refer to in this opinion is the plaintiffs' Amended Complaint filed on July 21, 2000.

sufficient to establish entitlement to relief based upon the violation of a clearly established constitutional or federal statutory right." *Williams v. Consol. City of Jacksonville*, M.D. Fla. 2000, __ F. Supp. 2d __ (No. 00-00469-CV-J-12, Nov. 1, 2000) (denying in part the defendants' motion to dismiss the plaintiffs' amended complaint for failure to state a claim upon which relief could be granted and their motion to dismiss the claims brought against Chief Alfred in his individual capacity on qualified immunity grounds and granting dismissal of the plaintiffs' § 1981 claim against the City), *aff'd*, 268 F.3d 1067 (11th Cir. 2001) (unpublished table decision). We affirmed that decision on interlocutory appeal, finding that the plaintiffs stated their cause of action sufficiently. *Williams*, 268 F.3d at 1067. We noted, however, that "further proceedings will determine whether the Appellant is entitled to qualified immunity." *Id.*

Thereafter, discovery commenced and the defendants moved for summary judgment, arguing, among other things,[10] that Chief Alfred was entitled to qualified immunity. Again, the district court disagreed, finding that Chief Alfred was not entitled to qualified immunity. The district court seemed to base its opinion, in large part, upon its conclusion that our previous opinion affirming its denial of the defendants' motion to dismiss barred Chief Alfred from receiving qualified immunity at the summary judgment stage. *Williams v. Consol. City of Jacksonville*, M.D. Fla. 2002, __ F. Supp. 2d __, 2002 U.S. Dist. LEXIS 27066 (No. 00-00469-CV-J-12, July 3, 2002) (denying the defendants' motion for

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[10] The other arguments raised by the defendants in their motion for summary judgment are not before us on appeal; thus, we do not consider them herein.

summary judgment).[11] Additionally, the district court stated that qualified immunity was not appropriate, because "Plaintiffs have presented evidence sufficient for a jury to conclude that they are entitled to relief based upon the violation of clearly established constitutional or federal statutory rights as set forth in their Amended Complaint." *Id.* at __, 2002 U.S. Dist. LEXIS 27066. As a result, Chief Alfred brought this interlocutory appeal of the district court's denial of the defendants' motion for summary judgment based upon qualified immunity.

STANDARD OF REVIEW

We review the district court's denial of a motion for summary judgment based upon qualified immunity de novo, construing the facts "in the light most favorable to the plaintiffs." *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002). "When that is done, a pure issue of law is created," *Cottrell v. Caldwell*, 85 F.3d 1480, 1486 n.3 (11th Cir. 1996), and "we then answer the legal question of whether the defendant[][is] entitled to qualified immunity under that version of the facts," *Lee*, 284 F.3d at 1190 (second and third alterations in original) (internal quotation marks omitted). As we previously stressed in qualified immunity cases, however, "the 'facts', [sic] as accepted at the summary judgment stage of the proceedings, may not be the 'actual' facts of the case." *Priester v. City of Riviera Beach*, 208 F.3d 919, 925 n.3 (11th Cir. 2000).

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[11] In this order, the district court also addressed the plaintiffs' motion for partial summary judgment and found in favor the plaintiffs, dismissing the defendants' ninth, tenth, eleventh, and thirteenth affirmative and special defenses. As this does not affect the outcome of this appeal, we do not address it further.

DISCUSSION[12]

"Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). In effect, qualified immunity "allows government officials to carry out their

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[12] As Chief Alfred's appeal ultimately hinges upon our legal determination of whether he violated a clearly established constitutional right when he declined to create four new roving captain positions, we conclude that we have interlocutory jurisdiction to review the district court's denial of summary judgment on qualified immunity grounds. *See Behrens v. Pelletier*, 516 U.S. 299, 311, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996) ("An order denying qualified immunity, to the extent it turns on an 'issue of law,' is immediately appealable" (citation omitted).); *Cottrell*, 85 F.3d at 1485 (Interlocutory jurisdiction exists over the denial of a summary judgment motion based upon qualified immunity when "the denial is based even in part on a disputed issue of law."). Moreover, Chief Alfred is not precluded from bringing this appeal interlocutorily by his previous interlocutory appeal of the district court's denial of qualified immunity on a motion to dismiss, *see Cottrell*, 85 F.3d at 1487 n.4 (A defendant is entitled to raise a qualified immunity defense in both a motion to dismiss and a motion for summary judgment, and he may appeal an unfavorable outcome of *both* motions interlocutorily if questions of law exist.), and our decision in that case did not prevent him from raising a qualified immunity defense on summary judgment, because that opinion addressed only whether qualified immunity was appropriate on a motion to dismiss, *see Williams*, 268 F.3d at 1067 (providing that "further proceedings will determine whether [Chief Alfred] is entitled to qualified immunity"). Accordingly, we have jurisdiction.

discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." *Id.* (internal quotation marks omitted).

"To receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Id.* (internal quotation marks omitted). "If the defendant was not acting within his discretionary authority, he is ineligible for the benefit of qualified immunity." *Lee*, 284 F.3d at 1194.[13]

"Once the defendants establish that they were acting within their discretionary authority, the burden shifts to the plaintiff to demonstrate that qualified immunity is not appropriate." *Lumley v. City of Dade City*, 327 F.3d 1186, 1194 (11th Cir. 2003). We evaluate whether an official is entitled to qualified immunity, using a two-part analysis set forth by the United States Supreme Court. *See Vinyard*, 311 F.3d at 1346. Under that analysis, "'the threshold inquiry a court must undertake . . . is whether [the] plaintiff's allegations, if true, establish a constitutional violation.'" *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 736, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)) (second alteration in original). "If a constitutional right would have been violated under the plaintiff's version of the facts, 'the next, sequential step is to ask whether the right was clearly established.'" *Id.* (quoting

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[13] On this record, it is undisputed that Chief Alfred was acting within his discretionary authority as the director and chief of the fire department when he made the employment decisions at issue. Plainly, he had the ultimate authority to create new positions and to fill vacancies in the department.

Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). Accordingly, we address each of these inquires in turn.

I. Constitutional Violation

We first must determine whether the allegations underlying the plaintiffs' claims against Chief Alfred in his individual capacity establish a violation of the Equal Protection Clause of the Fourteenth Amendment.[14] *See id.* The Equal Protection Clause[15] ensures a right to be free from intentional discrimination based upon race, *see Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1116 (11th Cir. 2001); *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1478 (11th

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[14] The plaintiffs argue that "Chief Alfred's conduct amounts to unlawful intentional discrimination in violation of the Constitution and Title VII." Because we are concerned only with whether Chief Alfred is entitled to qualified immunity for the claims brought against him in his individual capacity, however, we limit our analysis to whether Chief Alfred's conduct violated the Equal Protection Clause. *See Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995) ("The relief granted under Title VII is against the *employer*, not individual employees whose actions would constitute a violation of the Act" (internal quotation marks omitted).).

[15] The Equal Protection Clause provides, in relevant part, that

> no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Cir. 1991), and gender, *see Downing v. Bd. of Trs. of the Univ. of Ala.*, 321 F.3d 1017, 1022 n.9 (11th Cir. 2003); *Parks v. City of Warner Robins*, 43 F.3d 609, 616 (11th Cir. 1995). Accordingly, we have recognized an equal protection right to be free from employment discrimination, *see, e.g.*, *Thigpen v. Bibb County*, 223 F.3d 1231, 1237 (11th Cir. 2000), *abrogated on other grounds by AMTRAK v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), and we have found various race- and gender-based employment decisions by public officials, including those concerning discipline, promotions, transfers, reclassifications, and termination, in violation of that constitutional right, *see Alexander v. Fulton County*, 207 F.3d 1303, 1313, 1321 (11th Cir. 2000) (affirming a jury verdict of intentional employment discrimination by a black sheriff who made race-based employment decisions concerning white officers "with respect to discipline, promotions, transfers, [and] reclassifications"); *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1064 (11th Cir. 1992) (holding that intentionally discriminatory hiring and firing practices violated the Equal Protection Clause); *Brown*, 923 F.2d at 1478 (recognizing a right under the Equal Protection Clause to be free from termination because of race).

Here, the plaintiffs allege that Chief Alfred was motivated solely by his desire not to promote four more white men under the 1997 eligibility list when he decided not to create the new positions. *See Yeldell*, 956 F.2d at 1065 (looking to the defendant's underlying discriminatory motivation); *Brown*, 923 F.2d at 1478 n.8 ("[A] plaintiff must show a purpose or intent to discriminate in proving an equal protection violation based on racial discrimination."). Although the action taken by Chief Alfred is significantly different than the types of discriminatory employment actions we formerly found unlawful, we find that, as alleged, it

essentially was an intentionally discriminatory race- and gender-based employment decision.[16] Therefore, we hold that a decision not to *create* new positions that is based solely upon the race and gender of the next eligible candidates for

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[16] Clearly, Chief Alfred knew that by leaving things as they were and not creating the proposed positions, the 1997 eligibility list would expire on a fixed date and a new eligibility list, which *might* yield more diversity, would be generated through race-neutral means for future promotions. In that regard, he argues that our decision in *Allen v. Alabama State Board of Education*, 164 F.3d 1347, 1352-53 (11th Cir. 1999), *vacated on other grounds by* 216 F.3d 1263 (11th Cir. 2000), which he interprets as finding that race-conscious outreach efforts by government officials taken to broaden an applicant pool in a department with a history of racism were lawful if they ultimately disadvantaged no one, supports his actions in this case. Although it is apparent that Chief Alfred was faced with a dilemma, especially in light of the fire department's history of discrimination against minorities and women, we are limited at this stage to the facts as construed in the light most favorable to the plaintiffs. *See Lee*, 284 F.3d at 1190. As such, regardless of how well-intentioned Chief Alfred *might* have been, under *Allen*, his decision still was unlawful absent a valid affirmative action plan. *See* 164 F.3d at 1352-53 (The "strict scrutiny standard is plainly applicable where the government distributes burdens or benefits along racial lines, granting a preference or imposing a penalty to individuals because of their race."); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) ("Whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.").

promotion, in the absence of a valid affirmative action plan, violates the Equal Protection Clause.[17]

II. Clearly Established Law

As the plaintiffs have established the violation of a constitutional right, our next question is whether, at the time that Chief Alfred made his discriminatory employment decision, the unlawfulness of his actions was "clearly established." *Vinyard*, 311 F.3d at 1349. Indeed, Chief Alfred still "may . . . be shielded from liability for civil damages if [his] actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope*, 536 U.S. at 739 (quoting *Harlow*, 457 U.S. at 818). We undertake this determination "'in light of the specific context of the case, not as a broad general proposition,'" *Vinyard*, 311 F.3d at 1349 (quoting *Saucier*, 533 U.S. at 201), in an effort "'to ensure that before [public officials] are subjected to suit, [they] are on notice their conduct is unlawful,'" *Hope*, 536 U.S. at 739 (quoting *Saucier*, 533 U.S. at 206). This does not mean, however, that "the very action in question has previously been held unlawful"; rather, it means only that the "unlawfulness" of the action must have been apparent "in the light of pre-existing law." *Id.* Accordingly, "the salient question . . . is

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[17] In reaching this conclusion, however, we are by no means suggesting that a public official must create new positions merely because a subordinate official expresses a need for the positions and the next eligible candidates are of a particular race or that an employee who is next in line for promotion is somehow entitled to a position before it is created. Instead, we simply are extending our precedent to include the alleged employment action in this case - a decision not to create new positions based solely upon the race and gender of the next eligible candidates.

whether the state of the law [at the time of the unconstitutional act] gave respondents fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Id.* at 741; *see Vinyard*, 311 F.3d at 1350 (reiterating "that *fair and clear notice* to government officials is the cornerstone of qualified immunity" (internal quotation marks omitted)).

Such fair warning or "*fair and clear notice* can be given in various ways." *Vinyard*, 311 F.3d at 1350. In some rare cases, for instance, a violation may be so egregious that the Constitution or a statute on its face may be sufficient "to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the *total absence of case law*." *Id.* (providing a detailed discussion of this "obvious clarity" situation). More frequently, however, we must turn to case law to make our determination. *Id.* at 1351. While "some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts," more often, the facts are so material to the violation at issue that such generalized principles are insufficient, and we must look to precedent that is factually similar to the case at hand. *Id.*; *see Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 953 (11th Cir. 2003) (noting that we may look to "decisions of the Supreme Court, this court, or the highest court of the state in which the case arose" to determine if the law was clearly established). In this case, the Equal Protection Clause on its face was not enough to put Chief Alfred on notice that his actions were unlawful; therefore, we turn to case law to determine whether it was clearly established in 1999 that Chief Alfred's actions were unconstitutional.

"[A] broad principle in case law is [sufficient] to establish clearly the law applicable to a specific set of facts facing a

governmental official, [when] it . . . does so 'with obvious clarity' to the point that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted." *Vinyard*, 311 F.3d at 1351. As discussed above, we previously recognized a broad "equal protection right to be free from intentional racial [and gender] discrimination." *Brown*, 923 F.2d at 1478; *see also Alexander*, 207 F.3d at 1321; *Yeldell*, 956 F.2d at 1064. Although in some cases we have relied upon that broad equal protection principle to clearly establish the unlawfulness of intentionally discriminatory employment actions, *see Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003); *Alexander*, 207 F.3d at 1321,[18] on the unique facts of this case, that broad principle did not clearly and fairly warn Chief Alfred that a decision not to *create* new positions that were proposed by a subordinate official was unlawful, *see Vinyard*, 311 F.3d at 1351-52 (noting "that most judicial precedents are tied to particularized facts" and require us to "look at precedent *that is tied to the facts*"). If, as even Chief Alfred conceded, we were dealing with a situation in which he refused to promote plaintiffs, who were otherwise qualified, to *preexisting* positions based upon their race or gender, such a broad general statement would have provided fair and clear warning; however, given the unique facts of this case and the context in which this employment decision arose, the broad

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[18] Although *Alexander* could not have put Chief Alfred on notice as it was decided in 2000, we look to it for guidance as it addressed whether the law pertaining to a variety of discriminatory actions taken by public officials was clearly established in 1992. *See* 207 F.3d at 1321 (relying upon our precedent to conclude that "there can be no doubt that in December 1992 . . . it was clearly established that intentional discrimination in the workplace on account of race violated federal law").

equal protection principle articulated in our precedent was not enough to establish "'with obvious clarity'" that the employment action taken by Chief Alfred was unlawful. *Id.* at 1351. Accordingly, we must consider whether our precedent was similar enough to put Chief Alfred on notice that his actions were unlawful. See id.

In *Yeldell*, we denied qualified immunity to an elected black official, Commissioner Reuben Davis, with respect to claims brought against him for discriminatory personnel decisions. 956 F.2d at 1065. The alleged discriminatory actions at issue were (1) a claim by a white female who was dismissed from her position as temporary nursing supervisor for maternal/infant care when Commissioner Davis hired a less qualified black woman to fill the position permanently even though recruitment previously had been frozen for monetary reasons; (2) a claim by a white man who held a position as an independent contractor for three years, but was dismissed when Commissioner Davis declined to renegotiate his contract and instead created a permanent position for which he was unqualified so that he could offer the position to a black man; and (3) claims by three other employees who alleged that Commissioner Davis was motivated by racial factors when he made discriminatory hiring and firing decisions. *Id.* at 1064-65. After determining that from 1986 through 1989 the law was clearly established that demoting and firing employees and passing candidates up for existing job opportunities because of their race constituted "intentional race discrimination in the workplace," we held that Commissioner Davis was not entitled to qualified immunity. *Id.*

In reaching our decision, we relied upon our binding precedent in *Brown*, in which we denied qualified immunity to a city manager and police chief who were accused of firing

a black police officer on the basis of his race. *See id.* at 1064 (citing *Brown*, 923 F.2d at 1478). Specifically, we reasoned that the alleged "intentional race discrimination in the workplace" in *Yeldell* "was [no] less frowned upon by the laws of this society" than in *Brown* where "we held that 'it is beyond doubt that the principal right allegedly violated by the defendants - the equal protection right to be free from intentional racial discrimination - was clearly established at the time [the police chief] and [the city manager] fired [the police officer].'" *Id.* (quoting *Brown*, 923 F.2d at 1478) (second through fourth alterations in original); *see also Smith v. Lomax*, 45 F.3d 402, 407 (11th Cir. 1995) (echoing our determination in *Yeldell* that in 1989 the law barring "intentional discrimination in the workplace" sufficiently put two black members of a board of county commissioners on notice that casting votes to replace a white female county clerk with a black female solely on account of race violated the Equal Protection Clause (internal quotation marks omitted)).

The plaintiffs argue that in addition to *Yeldell* two cases that were not decided in the qualified immunity context, *Batey v. Stone*, 24 F.3d 1330 (11th Cir. 1994), and *Dumas v. Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980),[19] clearly established that Chief Alfred's decision was unlawful. In *Batey*, the plaintiff, a white female civilian employee of the United States Army, alleged that her supervisors discriminated against her on account of her gender by reorganizing the structure of the division in which she was

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[19] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

employed to avoid promoting her and by denying her the opportunity to serve as acting director of the division. 24 F.3d at 1331, 1332 n.6. We held that under the Title VII analysis the district court's grant of summary judgment in favor of the appellee on both claims was improper because "genuine issues of material facts existed concerning whether the appellee's employment decisions intentionally discriminated against [the plaintiff]." *Id.* at 1333, 1336.

Similarly, in *Dumas*, the plaintiff, a black female, alleged that the county refused to hire her for an existing vacancy due to her race and then later delayed filling the position when it became vacant even though she was the only certified candidate on the personnel board's employment register. *See* 612 F.2d at 976, 980. We reversed the district court's dismissal for failure to state a claim upon which relief could be granted and held that in alleging "that all defendants maintain racially discriminatory hiring practices, that each of the defendants decided and acted, separately and severally, not to fill the vacancy in order to avoid hiring a black person and that the Personnel Board and Town officials conspired to deprive [the plaintiff] of equal protection," the plaintiff sufficiently pled a race discrimination case under Title VII. *Id.* at 980.

In light of our precedent, we agree with the plaintiffs that it was clearly established in 1999 that it was unlawful for a public official to make a race- or gender-based decision concerning hiring, termination, promotion, or transfer to or from an existing position, *see, e.g.*, *Yeldell*, 956 F.2d at 1064-65; *Brown*, 923 F.2d at 1478, to refuse to fill an existing position because of the race of an applicant, *see Dumas*, 612 F.2d at 980, or to reorganize existing positions to avoid promoting an employee because of her gender, *see Batey*, 24 F.3d at 1333; *Yeldell*, 956 F.2d at 1064-65. Yet,

the employment action at issue in this case is distinctly different than those employment actions. Indeed, Chief Alfred did not make a decision concerning an *existing* or viable position. Instead, the decision at issue was whether to *create* four permanent high-level positions in the fire department as proposed by a subordinate official - a decision that involves the core structure of the fire department. As we find this distinction significant, we conclude that the above case law did not put Chief Alfred on notice that it was unconstitutional to make a decision not to *create* four new high-level positions as proposed by a subordinate official based solely upon the race or gender of the next eligible candidates.

Although we recognize that under *Hope* the exact unlawful action at issue need not have been resolved by previous case law, 536 U.S. at 739, we find it significant that the actions at issue in this case took place in a markedly different context than the other cases, *see Willingham v. Loughnan*, 321 F.3d 1299, 1301 (11th Cir. 2003) (noting that in most qualified immunity cases preexisting case law that is factually similar is necessary to give officials "'fair notice' that the behavior violated a constitutional right"), *petition for cert. filed*, 71 U.S.L.W. 3737 (U.S. May 16, 2003) (No. 02-1694); *see Vinyard*, 311 F.3d at 1351-52 ("We believe that most judicial precedents are tied to particularized facts" such that factually similar case law is necessary to put public officials on notice of the unlawfulness of their actions.). Specifically, all of the cases discussed above dealt with typical employment decisions that were made concerning an *existing* vacancy or a viable position. The decision at issue here, however, was whether or not to *create* four new high-level positions. Certainly, we cannot ignore the fact that there were no positions in existence when the decision was made and that the positions merely were proposed by a subordinate official who wanted Chief Alfred to create the positions and expected

him to do so before the eligibility list expired. Moreover, the plaintiffs were not entitled to a promotion *unless* a vacancy arose or a new position was created. Although intentional race- and gender-based discrimination is unlawful, none of the cases set forth by the plaintiffs fairly and clearly put Chief Alfred on notice that the decision at issue in this case was unlawful. As a result, we cannot say that Chief Alfred was "plainly incompetent" or that he "knowingly violated the federal law" when he decided not to create the new positions. *Vinyard*, 311 F.3d at 1346 (internal quotation marks omitted). Thus, we hold that Chief Alfred is entitled to qualified immunity in this case.

CONCLUSION

Although the plaintiffs' allegations establish that Chief Alfred violated the Equal Protection Clause, such a violation was not clearly established in 1999 when the unconstitutional act occurred. Under the unique facts of this case, we find that the general equal protection right to be free from employment discrimination did not provide Chief Alfred with fair and clear notice that his actions were unlawful. Furthermore, we were unable to find any case law that was similar enough to clearly establish that in 1999 it was a violation of the Equal Protection Clause for a public official to decline to *create* permanent positions as proposed by a subordinate official even when that decision was based upon the race or gender of the next eligible candidates. Thus, we hold that Chief Alfred is entitled to qualified immunity. Accordingly, we REVERSE and REMAND this case to the district court with instructions to enter summary judgment in favor of Chief Alfred as to the claims brought against him in his individual capacity.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION

Case No.: 3:00-cv-469-J-12TEM

[Filed July 5, 2002]

GEORGE A. WILLIAMS,	)
MICHAEL A. PERRYMAN,	)
MICHAEL B. PRICE, and	)
JUDY C. SAULS as Personal Representative	)
for the Estate of Nolen A. Sauls,	)
Plaintiffs,	)
	)
v.	)
	)
CONSOLIDATED CITY OF JACKSONVILLE	)
and FIRE CHIEF RAY ALFRED, in his	)
individual and official capacities,	)
Defendants.	)
	)

HOWELL W. MELTON
Senior United States District Judge

ORDER

This cause is before the Court on the parties' cross-motions for summary judgment. Defendants' Motion for Summary Judgment (Doc.79), memorandum of law in support (Doc.80), and depositions in support (Docs. 81-91) were filed on December 21, 2001. Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment (Doc.99), was filed January 18, 2002, along with three more depositions (Docs. 101-103). On February 4, 2002, Defendants' Rebuttal Memorandum in Response to Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment (Doc. 106) was filed.

Plaintiffs' Motion for Partial Summary Judgment (Doc.66), incorporated memorandum of law, and depositions in support (Docs. 69-77) also were filed on December 21, 2001. The Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment (Doc.98) was filed on January 18, 2002. On February 4, 2002, Plaintiffs' Rebuttal of Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment (Doc. 105) was filed.

On February 7, 2002, the "Plaintiffs' Motion to Strike Attachments to Defendants' Rebuttal ... to Plaintiffs' Response ... to Defendants' Motion for Summary Judgment'" (Doc. 107) was filed. Defendants' Response to Plaintiffs' Motion to Strike (Doc. 108) was filed on February 21, 2002.

On May 24, 2002, Plaintiffs filed supplemental materials (Doc. 109) in opposition to Defendants' Motion for Summary Judgment. Defendants' memorandum in response to Plaintiffs' supplemental materials (Doc. 113) was filed, June 26, 2002.

The Court will first address the motion to strike, and then the motions for summary judgment.

MOTION TO STRIKE

Plaintiffs seek to strike the Third Declaration of Chief Alfred and the attachments to it, which are part of Defendants' Rebuttal Memorandum in Response to Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment (Doc. 106). Plaintiffs assert that certain statements contained in Chief Alfred's Third Declaration inject new arguments into Defendants' motion for summary judgment without an opportunity for Plaintiffs to respond, consist largely of inadmissable statements, and purport to give legal opinions which Chief Alfred is not competent to render.

The Court is of the opinion that striking the Third Declaration of Chief Alfred and attachments to it pursuant to Fed.R.Civ.P 12(f) is not an appropriate remedy. The Court may review all of the evidence submitted by both parties and accord it the appropriate weight. The Court will thus deny Plaintiffs' motion to strike, but has considered the arguments contained therein, as well as those made in response, in making its determination on the motions for summary judgment.

MOTIONS FOR SUMMARY JUDGMENT

Summary Judgment Standard

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.

56(c). The Court's task is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The purpose of summary judgment is to dispose of unsupported claims of defenses which, as a matter of law, do not raise issues of material fact suitable for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The party moving for summary judgment bears the initial burden of demonstrating to the Court "by reference to materials on file, that there is no genuine issue of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). A court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods.*, Inc., 530 U.S. 133, 149-150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (discussing standard for granting judgment as a matter of law under Fed.R.Civ.P. 50, which mirrors the standard for granting summary judgment under Rule 56); *Hinson v. Clinch County Bd. of Educ.*, 231 F.3d 821, 826-27 (11th Cir. 2000). The Court considers the entire record, but must disregard all evidence favorable to the moving party that the jury is not required to believe. *Reeves*, 530 U.S. at 151; *Hinson*, 231 F.3d at 827.

Once the moving party has met its burden, the burden shifts to the non-moving party to show that there is a material issue of fact that precludes summary judgment. *Clark*, 929 F.2d at 608. The non-moving party may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts, through affidavits or other forms of evidence

provided for by the rules. *Adickes v. SH. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

"[T]he inquiry is whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 252-52. A genuine issue of material fact exists where there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor. *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995); *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc).

The Court has carefully considered all the submissions of the parties. For the reasons set forth below, the Court will deny Defendants' Motion for Summary Judgment and grant Plaintiffs' Motion for Partial Summary Judgment.

Factual Background

Plaintiffs' Amended Complaint (Doc. 15) asserts four counts of racial and gender discrimination in employment. Count One seeks relief from Defendants Consolidated City of Jacksonville (the City) and Fire Chief Rayfield Alfred (Chief Alfred), in his official and individual capacities, for alleged violations of 42 U.S.C. § 1983. Count Two seeks relief against Chief Alfred, in his official and individual capacities, for alleged violation of 42 U.S.C. and § 1981.[1] Counts Three and Four seek relief from the City and Chief Alfred in his official capacity only, for alleged violations of Title VII of the

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[1] The Court dismissed Count Two against the City of Jacksonville. *See* Doc.30.

Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended, and the Florida Civil Rights Act (FCRA).

The four Plaintiffs, George A. Williams, Michael A. Perryman, Nolen A. Sauls, and Michael B. Price, Lieutenants in the Rescue Division of the Jacksonville Fire and Rescue Department, filed this action on May 3, 2000.[2] In 1997, they had taken an examination which made them eligible to be promoted to Rescue Captains. The results of this examination were certified on October 14, 1997, and Plaintiffs ranked ninth, tenth, eleventh, and twelfth respectively, out of the thirty-seven (37) who took the test. Pursuant to the City of Jacksonville's contract with the Jacksonville Association of Firefighters, Local 122 ("the Union"), promotions to Captain's vacancies must be made from this list in order of the rankings. Also pursuant to the contract with the Union, the list expires after two years.

In the weeks preceding the expiration of the promotional list, Thomas McCrone, the Chief of the Rescue Division, initiated an effort to have four new roving Rescue Captain's positions created prior to the expiration of the Rescue Captain's promotional list. If this effort had succeeded, it would have resulted in the creation of four Captain's vacancies and the promotion of Plaintiffs to the four positions.

Chief McCrone prepared a written proposal that he submitted to Chief Alfred asking that four new roving Captain's positions be created. Chief Alfred turned the proposal down. The term of the Rescue Captain's promotional

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[2] Plaintiff Nolen A. Sauls, died after this action was filed and has been replaced by Judy C. Sauls, his wife, as representative for his estate.

list expired, and no additional permanent Captains were appointed from it.

Plaintiffs assert that Chief Alfred's motivation for failing to create the four new roving Captain's positions, which would have resulted in their promotions, and permitting the list to expire was based upon their race and sex (white males). In other words, Plaintiffs maintain that but for the fact that they are white males, Chief Alfred would have approved the four new positions and they would have been promoted.

For example, according to Plaintiff Price, McCrone stated that in refusing to approve the four new roving Captain's positions, Chief Alfred said that they (meaning the Plaintiffs) did not reflect the "cultural diversity" of the Fire Department. Price Depo. at 16-17. Price also claims that after McCrone made this remark, he asked McCrone whether this meant they were not going to be promoted because they were not African-American. To this question, Price says, McCrone responded, "Basically." Price Depo. at 17.

Chief Ray Alfred denies he made the statement attributed to him, or any similar statement, states that the decision was not a race-conscious one, and maintains that he declined to create the four new proposed positions for legitimate management reasons. Defendants also argue, alternatively, that if race was a consideration in Chief Alfred's decision, it constituted valid affirmative action, was otherwise legally valid, or was required to avoid violating the law by creating a disparate impact on minorities.

Since these events in October 1999, a number of new Rescue Captain's vacancies have arisen. Each of the three surviving Plaintiffs, during the years 2000 or 2001, was appointed to one of these Rescue Captain's vacancies on a

provisional basis - - the designation to last only until a new Rescue Captain's promotional list was prepared. In November, 2001, a new exam was given and a new Rescue Captain's promotional eligibility list was due to be certified in January, 2002. When that occurred Plaintiffs were to lose their status as provisional Captains, revert back to Lieutenants, and the vacancies would be filled permanently by the Lieutenants ranking first, second, and third on the promotional list.

Plaintiffs elected not to take the exam and filed a motion for preliminary injunction asking the Court to maintain their positions as provisional Captains until the conclusion of this action. The Court denied Plaintiffs' Motion for Preliminary Injunction, relying largely on Defendants' representations that if Plaintiffs are ultimately successful in this action, Captain's positions will be made available for them if there are no vacancies and that Plaintiffs would be permitted to take the next promotional examination for District Chief if one is given before the conclusion of this case. *See* Doc. 104.

Defendants' Motion for Summary Judgment

Defendants now seek summary judgment on all remaining counts of Plaintiffs' Amended Complaint on three bases. First, Defendants assert that the undisputed facts in this case show that Chief Alfred did not approve the new Roving Captain's positions because he lacked sufficient business justification to do so, that is, because there was no real "need" for the positions at the time. Defendants also maintain alternatively, that if the record establishes a question of fact about Chief Alfred's true motivation in declining to approve the four roving Captain's positions, a motivation to include more African-Americans and females does not constitute illegal discrimination under the law. Finally, Defendants

assert that the undisputed facts show that Chief Alfred, in his individual capacity, is entitled to qualified immunity in his official capacity as a matter of law on all counts.

This is a disparate treatment case. Plaintiffs have alleged, and have proffered evidence to support, that Chief Alfred declined to approve the creation of four new roving Captain's positions because of the race and/or sex of Plaintiffs. Chief Alfred's motivation is the key question that must be resolved and after reviewing the numerous depositions and other materials submitted by the parties, the Court is of the opinion that genuine issues of material fact remain for a jury's determination as to Chief Alfred's motivation.

For example, questions of fact remain about whether the four roving Captain's positions were indeed necessary and whether Chief Alfred declined to approve the positions because he believed they were unnecessary, or because he preferred to wait to fill needed positions from a new pool of applicants or because he did not want to promote the four Plaintiffs because they were white males. The record contains a basis from which a jury could reach conclusions in favor of either party on any of these questions by a preponderance of the evidence. Because questions of material fact remain surrounding Chief Alfred's motivation in declining to create the new roving Captain's positions, summary judgment is not proper as to any of Plaintiffs' discrimination claims on the first basis asserted by Defendants.

Defendants' alternative basis for their Motion for Summary Judgment hinges on Defendants' characterization of Chief Alfred's alleged statements that the four Plaintiffs did not represent "the cultural diversity of the Fire Department" and/or that he would like to "promote from a larger pool of qualified applicants," or some other similar statement, as

evidencing a non-discriminatory, purely legitimate motive of wanting to include more persons in the promotion process.[3] While Defendants' theory of Plaintiffs' case may ultimately be accepted by a jury, the Court is of the opinion that the numerous material questions of fact demonstrated by Plaintiffs preclude summary judgment on this alternative basis as well.

Defendants claim that viewing all of the record evidence in the light most favorable to Plaintiffs, they have established nothing more than that Chief Alfred permitted the promotional eligibility list to expire because he wanted to promote more women and minorities. They argue that such inclusionary motive or goal does not give rise to a cause of action for discrimination. Defendants cite numerous cases for the proposition that employers whose motive is to include more persons such as women and minorities in the application/selection process for employment do not violate anti-discrimination law.

The Court has reviewed the cases cited by Defendants and notes that all involve factual situations markedly different from that presented by this case. For example, *Barbera v. Metro-Dade County Fire Department*, 117 F. Supp. 2d 1331, 1332 (S.D. Fla. 2000) involved a fire department that had voluntarily adopted an affirmative action program and established minority hiring goals to remedy a history of systematic discrimination. Plaintiffs in that case were white males who challenged a change in testing procedures for

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[3] Defendants made a similar argument in their Motion to Dismiss, which the Court denied and the Eleventh Circuit Court of Appeals affirmed. *See* Docs. 30 and 61. The Court repeats some of its analysis here as relevant to the issues raised on summary judgment.

hiring that sought to include more women in the applicant pool.

The *Barbera* court stated that "[a]ssuming that Plaintiffs are correct that the intent of the modifications [to the testing procedures] was to increase the number of qualified female applicants, neither the Equal Protection Clause nor Title VII would be offended." *Id.* at 1336. The court noted that increasing the number of qualified female applicants means only that qualified male applicants must compete with qualified female applicants. *Id.*, citing *United States v. Paradise*, 480 U.S. 149, 183, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987), and *Duffy v. Wolle*, 123 F.3d 1026, 1039 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137, 118 S. Ct. 1839, 140 L. Ed. 2d 1090 (1998). The court also observed that inclusive measures taken to increase the pool of qualified applicants "do not affect the selection process for hiring or promotion, [rather, they] seek to ensure that as many qualified candidates as possible make it to the selection process." *Id.* at 1337. The court stated that such inclusive measures are not subject to strict scrutiny because "they expand the field of applicants rather than deny opportunity (i.e. discriminate)." *Id.*, (citing *Allen v. Alabama Bd. of Educ.*, 164 F.3d 1347, 1352-53 (11th Cir. 1999)(unequal treatment based on race triggers strict scrutiny, not mere race-consciousness in recruiting, hiring, or promotion), *vacated by*, 216 F.3d 1263 (11th Cir. 2000) (upon request of parties); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994); *Sussman v. Tanoue*, 39 F. Supp. 2d 13, 25-26 (D.D.C. 1999). The Barbera court concluded the testing modifications were not unlawful by finding that they were made for the permissible purpose of including qualified female applicants, were instituted in a non-discriminatory fashion, and had no discriminatory effect. *Id.* at 1340-41.

Unlike the *Barbera* case, the City has not adopted an affirmative action program. Moreover, Plaintiffs in this case assert that Chief Alfred's motivation was not simply to include more women and minorities in the promotion pool, but was to deny them promotions because they were white males. They allege that Chief Alfred exercised his discretion in a discriminatory fashion and that they suffered harm as a result. These allegations clearly distinguish the instant case from Barbera, as well as from other cases cited by Defendants in support of their position.

In *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1551-56 (M.D. Ala. 1995), the court presents a lengthy, well-reasoned discussion of inclusive versus exclusive means of affirmative action, citing several of the cases upon which Defendants rely. The Shuford court explains that such inclusive techniques have been helpful in remedying a long history of discrimination in this country, but must be examined for their consequences on third parties. *Shuford* at 1551-52.

Again, the *Shuford* court is discussing inclusive techniques in the context of an existing affirmative action plan, which does not exist in the case before this Court. The fact that *Shuford* and *Barbera* arose in the context of an affirmative action plan is significant because a public employer defending its affirmative action plan, and the techniques used must show that it has a strong evidentiary basis for its conclusion that remedial action was necessary. *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1564-1566 (11th Cir. 1994). It is in the context of a plan formed to remedy past discrimination that techniques that are intended to include or favor certain groups are evaluated.

The *Shuford* court also states that while "[r]eopening the application and selection process and recruiting are always neutral with respect to selection if they are inclusive," allegedly inclusive measures designed "to reopen the recruitment and selection process could be merely a pretext to hire someone not in the original pool." *Shuford* at 1553. The technique cannot be considered inclusive, and therefore subject to lesser scrutiny, if it has been used to select someone outside the original pool or avoid someone in the original pool. *Id.* at 1553 and n. 24. "The court has a responsibility to ensure affirmative action techniques that purport to be inclusionary are actually inclusionary." *Id.* at 1553. A pretext to hire persons not in the original pool is precisely what Plaintiffs have alleged in their Amended Complaint.

Plaintiffs have alleged in this case, and have proffered evidence to support their theory, that Chief Alfred refused to create the new positions or to extend the eligibility list to promote them based upon their race and/or gender because he hoped to promote African-Americans or women instead of the white male Plaintiffs. These allegations, if proven, do not amount to mere techniques of inclusion as discussed in the cases cited by Defendants and are actionable intentional discrimination in employment.

Plaintiffs in this case have presented evidence that they were the next four persons eligible for promotion based upon the administration of a race/gender neutral examination, but Chief Alfred refused to take the final step to create four new necessary positions based on Plaintiffs' race and/or gender. Plaintiffs case involves assertions of discriminatory motive, intent, and effects. The Court concludes that Plaintiffs have submitted evidence sufficient for a jury to find in their favor and therefore Defendants are not entitled to summary judgment on their alternative theory.

The Court now addresses Defendants' third basis for summary judgment. Chief Alfred is entitled to summary judgment in his individual capacity, based upon qualified immunity, if the evidence proffered would not establish a violation of clearly established constitutional or statutory rights of which a reasonable person would have known. *See e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The Eleventh Circuit Court of Appeals has already found in this case that Chief Alfred was not entitled to qualified immunity as a matter of law based on the allegation set forth in Plaintiffs' Amended Complaint when it affirmed the Court's denial of Defendants' Motion to Dismiss. *See* Doc. 61.

For the reasons stated above, Defendants' Motion for Summary Judgment based on qualified immunity must be denied at this stage of the proceedings as well, as Plaintiffs have presented evidence sufficient for a jury to conclude that they are entitled to relief based upon the violation of clearly established constitutional or federal statutory rights as set forth in their Amended Complaint.

Accordingly, the Court will deny the Defendants' Motion for Summary Judgment.

Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs seek summary judgment on Defendants' ninth, tenth, eleventh, and thirteenth affirmative and special defenses. Defendants' ninth, tenth, and eleventh defenses state that if Defendants' conduct is found to be motivated by the goal of furthering cultural diversity or such similar reason, it was lawful under § 1983, Title VII and the FCRA as valid affirmative action, narrowly tailored to achieve a compelling

state interest, or lawful conduct designed to avoid discrimination against minorities and women.

It is undisputed that the City did not have a formal affirmative action plan at the time Chief Alfred decided not to approve the four roving Captain's positions, and that Chief Alfred denies making that decision based upon any personal affirmative action plan or any consideration whatsoever of race or sex. Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment, Doc.98 at p.4; Alfred Depo. at 17-20, 53-55,61, and 102-103. Defendants in effect assert that if Chief Alfred's motivation was to have a larger pool of candidates to promote from, specifically a pool that included more women and African-Americans, such motive amounted to an informal affirmative action plan or was lawful conduct designed to avoid discrimination against minorities and women as a matter of law, regardless of the effect on Plaintiffs, and does not constitute actionable employment discrimination.

In raising the ninth and tenth defenses, Defendants would have to prove the existence of some sort of informal affirmative action plan. The Defendants have simply pointed to insufficient evidence in the record which would describe the parameters of any such plan and permit the Court to evaluate whether it was lawful.

As discussed above, the cases cited by Defendants involve decisions made pursuant to an affirmative action plan. Such plans set goals for percentages of women or minorities to be hired or to fill certain positions, set time limits for achieving such goals, and prescribe specific methods for achieving them. Defendants have proffered no such evidence in this case.

Defendants have cited no authority for evaluating individual employment decisions, on a decision-by-decision basis, as to whether they constitute valid affirmative action, when the factual situation presented does not involve a formal affirmative action plan, a consent decree, or some clearly articulated attempt to remedy past discrimination on the part of the decision-maker. The Court is not inclined to fashion such a precedent on the facts of this case.

In addition, with regard to the eleventh defense, Defendants' assertion that if Chief Alfred's motivation was to include more women and minorities, it was lawful conduct designed to avoid discrimination against minorities and women as a matter of law and does not constitute actionable employment discrimination, ignores the fact that Plaintiffs have alleged and proffered evidence of intentional disparate treatment. Defendants have not citedlegal authority to support the position that such motive would excuse intentional racial discrimination as a matter of law.

Therefore, for the reasons stated above, the Court will grant Plaintiffs' Motion for Partial Summary Judgment as to Defendants' ninth, tenth, and eleventh affirmative and special defenses.

In granting summary judgment as to these defenses, the Court will no way preclude Defendants from making their alternative argument that Chief Alfred's statements may indicate that he was motivated by a desire to have a larger pool of qualified applicants that included more women and minorities, or such similar argumentbased upon the evidence, as relevant to his motivation. Such arguments are relevant and proper to a determination of whether Chief Alfred had a legitimate business reason for declining to create the new positions or whether he intentionaly declined to create the

positions because the Plaintiffs were white males. As stated earlier, the Court is of the opinion that genuine issues of material fact exist with regard to these matters and a jury should be allowed to make the final determination of Chief Alfred's motivation and Defendants' resulting liability, if any.

Defendants' thirteenth defense is that if Chief Alfred had created the four new roving Captain's positions, it would have had a disparate impact on African-Americans and thus would have constituted illegal discrimination. The Court agrees that Plaintiffs also are entitled to summary judgment on this thirteenth affirmative defense.

First, Chief Alfred denies being concerned about the legal impact promoting four white lieutenants would have on African-Americans. Alfred Depo. at 59-60. Second, this is a disparate treatment case and the central question is whether Chief Alfred was motivated by Plaintiffs' race and/or sex in making his decision. While Defendants may be correct that had Chief Alfred made the decision to create the positions and promote Plaintiffs, African-American lieutenants on the existing list or those who would have been eligible to take a new exam, may have had a cause of action, that case is simply not before the Court. Defendants have cited no authority for the proposition that intentional race or sex discrimination against a person or several persons is excused by the threat of disparate impact on another group.

As stated earlier, the central issue in this case in Chief Alfred's motivation in declining to create the positions that the four white Plaintiffs would have received. The impact on any other group in irrelevant, especially on the facts of this case where the decision-maker, Chief Alfred, specifically denies that he was motivated by potential discrimination claims of African-American firefighters in making his decision. Alfred

Depo. at 59-60. Therefore the Court will grant summary judgment in favor of Plaintiffs as to Defendants' thirteenth defense.[4]

Accordingly, it is

ORDERED AND ADJUDGED:

1. That "Plaintiffs' Motion to Strike Attachments to 'Defendants' Rebuttal ... to Plaintiffs' Response ... to Defendants' Motion for Summary Judgment'" (Doc. 107) is denied;

2. That Defendants' Motion for Summary Judgment (Doc.79) is denied; and

3. That Plaintiffs' Motion for Partial Summary Judgment (Doc.66) is granted as set forth above.

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[4] Defendants urge the Court, at a minimum, to permit them to use evidence of disparate impact to reduce or mitigate damages, citing *McKennon v Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995) and *Crapp v. City of Miami Beach*, 242 F.3d 1017 (11th Cir. 2001). Both cases involved findings of intentional discrimination, but the courts permitted after-acquired evidence of a legal justification for the challenged employment decision, arising from the conduct of the employee, to be used to reduce the award of future damages.

In the absence of any supporting authority, the Court is not convinced that it should extend *McKennon* and *Crapp* to the situation presented in this case which does not involve any conduct of *Plaintiffs* alleged to give rise to an after-acquired basis to refuse to create the new roving Captain's positions.

DONE AND ORDERED this 3rd day of July 2002.

/s/_____

HOWELL W. MELTON
Senior United States District Judge

Supreme Court, U.S.
FILED
JAN 28 2005
OFFICE OF THE CLERK

(2)

No. 04-718

IN THE

Supreme Court of the United States

GEORGE A. WILLIAMS,
MICHAEL A. PERRYMAN, *et al.*,

Petitioners,

v.

CONSOLIDATED CITY OF JACKSONVILLE,
RAYFIELD ALFRED, Fire Chief,
in his individual and official capacities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

This Court should deny the writ for two reasons. First, Petitioner has not demonstrated that the Eleventh Circuit's decision is erroneous. Second, Petitioner has not demonstrated any basis for conflict between the Eleventh Circuit's decision and this Court's precedents or those of other circuits.

I. Petitioners Did Not Present, As Claimed, A Case Of Intentional Illegal Racial Discrimination

Promotion to the position of Rescue Captain within the Jacksonville Fire Department is made from an eligibility list based upon a race-neutral written examination, with candidates ranked solely on the basis of their grade on the examination, as mandated by the City's contract with the firefighters union. *Williams v. Consolidated City of Jacksonville*, 341 F.3d 1261, 1264-1265 (11th Cir. 2003). Each eligibility list is valid for a period of two years after which a new test is given and a new list is established. *Id.* The list in question was established on October 14, 1997 and expired two years thereafter. 341 F.3d 1265 n.4. During the two year period eight individuals, all white, had been promoted, in accordance with their ranking, as vacancies in the position of Rescue Captain arose. 341 F.3d 1265 n.5. In October 1999, nine days before the list expired, Thomas McCrone, Chief of the Rescue Division, presented to Fire Department Chief Ray Alfred, in a meeting at which only the two were present, a request that four new Rescue Captain positions be created within the ensuing nine days, so that the next four rescue lieutenants on the promotional list, numbers 9 through 12, the Petitioners, could be promoted prior to the list's expiration nine days later. 341 F.3d 1265. Petitioners are each white. *Id.*

The sum of the evidence that Fire Chief Ray Alfred discriminated illegally on the basis of race rests on a telephone conversation which occurred between Rescue Division Chief McCrone and Petitioner Price a short time after McCrone's meeting with Fire Chief Ray Alfred.[1] According to McCrone, as related by Petitioner Price, "Alfred said the next four people on the list do not reflect the diversity of the fire department." 341 F.3d n.8. Price responded to McCrone, "So basically you're not doing this because we're not black?" *Id.* McCrone answered, "Basically." *Id.*

While the statement made by Chief Alfred, as quoted by McCrone, that "the next four people on the list do not reflect the diversity of the fire department" is clearly admissible against Fire Chief Alfred in his personal capacity,[2] the capacity at issue in determining whether he can be held personally liable, the second statement made by McCrone in response to Petitioner Price' question is not. Price' question, "So basically you're not doing this because we're not black," to which McCrone answered, "Basically," is at best a reasoned conclusion that reflects McCrone's own thinking, and at worst is speculation. Either way, however, it is not admissible against Chief Alfred personally on the issue of qualified immunity under Fed. R. Ev. 403.[3]

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1. For purposes of this appeal of the district court's denial of qualified immunity to Chief Alfred on summary judgment, the facts are construed "in the light most favorable to the plaintiff[s]," *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002), and may not be the 'actual' facts of the case," *Priester v. City of Riviera Beach*, 208 F.3d 919, 925 n.3 (11th Cir. 2000).

2. Fed. R. Ev. 105 allows the admission of evidence for a limited purpose.

3. Price' question and McCrone's answer would, however, clearly be admissible against the City, which is also a defendant in the case, since McCrone was in a managerial position. Fed. R. Ev. 801(d)(2)(A).

Absent this inadmissible statement, for purposes of the qualified immunity determination only, Petitioners are left solely with the statement that "the next four people on the list do not reflect the diversity of the fire department" as the predicate for concluding that Chief Alfred intentionally discriminated on the basis of race. This is a weak reed upon which to rely to establish the proposition that Chief Alfred engaged in racial discrimination, especially with McCrone's inadmissible speculation omitted.

Significantly, the rejection of McCrone's request by Chief Alfred did not necessarily mean the Petitioners would not ultimately be promoted to the next Captain's position vacancies, when they arose, or that Chief Alfred would be able to determine who did fill the vacancies. Instead, that would be determined by the results of the next Captain's examination, in which Petitioners, along with others, would be able to compete and be ranked, based on their test scores.

The word "diversity", in the context utilized by Chief Alfred, simply does not equate to illegal racial discrimination as claimed by Petitioners. *See*, *for example*, the discussion in *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), wherein the Court held that the University of Michigan Law School has a compelling interest in attaining a diverse student body, and discussed "diversity" at great length, albeit not in an employment context. Moreover, for the reason set forth in Argument III below, a discussion of diversity may legitimately arise in the context of considering organizational changes in the workplace. Accordingly, these facts do not present, as claimed, a case of intentional racial discrimination.

II. There Is No Persuasive Basis For Granting Certiorari

Petitioners' first argument is that the Eleventh Circuit ignored applicable precedents of this Court and lower federal courts in reversing the District Court's denial of qualified immunity in this case involving a soon-to-expire promotion list.

The Petitioners claim that the Eleventh Circuit's opinion conflicts with this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002) as well as other federal appellate decisions. The Eleventh Circuit's decision, however, raises no meaningful issue of importance for this Court's review based on conflict or otherwise. *Braxton v. United States*, 500 U.S. 344 (1991) ("A principal purpose for which we use our certiorari jurisdiction ... is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

Indeed, the Eleventh Circuit specifically addressed the applicability of *Hope* and noted the important distinction, between creating jobs nine days before the candidates' list expires that would favor existing applicants of a certain race (white), and refusing to fill an existing position based solely upon the race of the qualified applicant. *Williams*, 341 F.3d at 1272-73. Rule 10 of the Court's rules states that a petition for certiorari "is rarely granted" when the asserted error consists of the misapplication of a properly stated rule of law. Petitioners have asserted nothing more here. Certiorari accordingly, should be denied.

III. Established Precedent Of This Court And The 11th Circuit Required The Fire Chief To Consider The Disparate Impact On Racial Minorities That Would Have Resulted Had He Created Four New Positions Nine Days Before The Candidates' List Was To Expire

Unrefuted evidence, in the form of testimony by an expert witness[4] was presented in the District Court that creating four new high ranking positions in a rush, with the promotional list about to expire, with the specific knowledge that all four individuals to be promoted were white, given the absence of business necessity for proceeding in this manner, would constitute an illegal employment practice under Title VII because of the resulting disparate impact on minorities in the Fire and Rescue Department.[5] Disparate impact theory prohibits neutral employment practices which, while non-discriminatory on their face, visit an adverse, disproportionate impact on a statutorily protected group. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). 42 U.S.C. § 2000e-2(k), **Burden of proof in disparate impact cases**, reads in part as follows:

> (1) (A) An unlawful employment practice based on disparate impact is established under this title only if —
>
> > (I) a complaining party demonstrates that a respondent uses a particular employment

4. Dr. Gerald V. Barrett, Ph.D., J.D., Akron, Ohio, an industrial psychologist.

5. *See* Document 80, District Court docket, Exhibit L, pp. 4, 50, 79-82.

> practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity

This statute is a codification of what the Eleventh Circuit describes as "settled jurisprudence" related to disparate impact methodology. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000). Significantly, the duty to adhere to this law is present for and applicable to all covered employers, *irrespective* whether or not they happen to have an affirmative action plan in place.

Complying with the nondiscrimination provisions of Title VII requires a disparate impact analysis to determine what impact the questioned employment practice has on the "diversity" of the work force, thus making a diversity inquiry necessary prior to simply saying "yes" to the creation of new positions under the circumstances presented. *See EEOC v. Joe's Stone Crab, Inc.* 220 F.3d at 274-278. Fire Chief Ray Alfred obviously must be assumed constructively to have knowledge of this law in the same manner he is said to be legally on notice of the Eleventh Circuit's decisions in *Yeldell* and other cases. For this reason, Fire Chief Ray Alfred's statement that "the next four people on the list do not reflect the diversity of the fire department" do not necessarily constitute evidence of an illegal discriminatory action, but rather may represent evidence of an entirely legal action — ensuring that his Department does not implement an illegal employment practice. Pursuant to this reasoning, Chief Alfred's conduct in this case was surely not a "clearly established" violation of law.

In summary, Title VII disparate impact theory has been the law for many years and must be followed, even in absence of an affirmative action plan. Adhering to it requires management to engage in diversity analyses relative to employment practices such as whether and when four new high ranking positions should be created, as in the circumstances of this case. There was no Eleventh Circuit case law in place, or other "clearly established" law, which indicated that engaging in a disparate impact inquiry in the circumstances of this case was illegal.[6]

IV. The *Yeldell* Decision Did Not "Clearly Establish" Law That Governed This Case

Petitioners contend that the case of *Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056 (11th Cir. 1992) provided "clearly established law" which put Fire Chief Ray Alfred on notice that he could not decline to create four new Captain's positions for Petitioners in the circumstances of this case. The Eleventh Circuit correctly rejected this argument, concluding that Chief Alfred did not make a decision concerning already existing positions, as in *Yeldell*, but rather was deciding whether to *create* four new permanent high level positions, as proposed by a subordinate, a significant distinction. 341 F.3d at 1272.

In *Yeldell* two personnel decisions made by Health and Human Services Commissioner Reuben Davis, an elected black official, with respect to two individuals, Karen Cremer, and Russell Starkey, were at issue. Karan Cremer, a white

6. The District Court rejected disparate impact law as a defense in denying summary judgment in the case. See Document 114, District Court Docket, p. 15. The Court of Appeals did not address this issue, even though it was raised in Ray Alfred's briefs on appeal.

woman held the position of Acting Supervisor for Maternal/ Infant Care at Cooper Green Hospital (apparently having been given that title when the position became vacant). 956 F.2d at 1064-65. Recruiting for a person to be permanent (rather than "Acting") Supervisor was suspended ("temporarily frozen") by Commissioner Davis, allegedly for monetary reasons, until a suitable black applicant for the job, Ms. Bone, was found. *Id.* Ms. Bone, though less qualified, was given the job, the alleged monetary barrier somehow disappearing. *Id.*

Russell Starkey, a white man, had worked for Green Cooper Hospital for three years as an independent contractor doing the work of a Credit and Collections Manager. 956 F.2d at 1065. Commissioner Davis decided not to renegotiate Starkey's contract, instead creating a position on the hospital's staff called Credit and Collections Supervisor. *Id.* Davis opened the new job only to applicants who held 4 year degrees. *Id.* Starkey did not, and the job was given to a black individual who had a 4 year degree. *Id.*

Both the Cremer and Starkey scenarios differ from the facts or scenario in this case in several key respects. Most significantly they both involved a job or position that already existed. The Nursing Supervisor's job held by Cremer in an Acting capacity already existed, but was rendered temporarily unavailable through alleged trick or scheme. The Credit and Collections Manager's job held by Starkey already existed also and was converted by alleged trick or scheme to a position having a different status, with an alleged bogus job qualification which rendered Starkey not eligible to compete for it.

The situation in this case differs markedly from that in *Yeldell*. First, there were no vacancies in existence to be promoted to — period. Chief Alfred was asked to create four new "roving" Captain's positions shortly (9 days) before the Captain's promotional list expired. Document 73, District Court Docket, pp. 8, 39. Chief Alfred declined to create four new "roving" Captain jobs that hadn't previously existed because the next four people on the list did not reflect the "diversity of the fire department." Second, and unlike Rueben Davis in *Yeldell*, Chief Alfred would not be able to select the identity or race of the next candidates to be promoted when vacancies again arose. This is because of the race neutral test which all candidates for Rescue Captain took to be promoted, with the test score, exclusively, determining who was promoted. Indeed, Petitioners themselves had the option to again take the test and could still have been the next candidates promoted, when vacancies arose, if they ranked 1 through 4 in the test results. The holding in *Yeldell* does not extend this far and does not cover this situation, but rather involves blatant selection of an individual of a different race.

The test to be applied to these circumstances has been reformulated since the *Yeldell* case was decided. In *Yeldell* the analytical questions were: first, whether the laws allegedly violated were clearly established at the time of the defendant's acts; second, whether the plaintiff had presented evidence sufficient to create a genuine issue of fact as to whether the defendant had engaged in conduct violative of that clearly established law. *Yeldell*, 956 F.2d at 1064.

Now, "'[t]he threshold inquiry a court must undertake . . . is whether [the] plaintiff's allegations, if true, establish a constitutional [or statutory] violation'." *Vineyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002), *quoting Hope v. Pelzer*,

536 U.S. 730, 736 (2002). If the answer to this question is in the affirmative, "the next sequential step is to ask whether the right was clearly established." *Vineyard*, 311 F.3d at 1346, *citing Saucier v. Katz*, 533 U.S. 194, 201 (2001).

The Eleventh Circuit clearly was correct in concluding that no "clearly established" law governed Fire Chief Ray Alfred's alleged conduct in October 1999. The fact that the present case distinctly involves creating new positions is a far leap from the facts in *Yeldell.*

CONCLUSION

The Court should deny certiorari in this case. There is no conflict between the rulings of separate courts of appeals which would justify review by the Court. The Eleventh Circuit's ruling in this case was correct and should not be disturbed. Indeed, Petitioners assert only that the Eleventh Circuit has misapplied the holding in *Hope v. Pelzer*, a situation in which, pursuant to Rule 10, if that were the case, certiorari "is rarely granted".

The alleged facts in this case do not constitute a "clearly established" violation of law. Considering "diversity" in determining not to create four new high level positions during a narrow time frame when requested by a subordinate was not clearly illegal, because established disparate impact law required that such an analysis be made. This in itself served to make any relevant law purporting to prohibit such conduct singularly unclear. Second, and independently, *Yeldell* differed from the instant case in that it involved existing positions, not new positions, and in that when vacancies arose, they would be filled in a non-discriminatory manner. These circumstances establish not only that the Eleventh

Circuit was correct on the merits, but also that this case should not be placed on this Court's docket. Certiorari should accordingly be denied.

Respectfully submitted,

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